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W. B. Brown  
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THE  
CANADIAN  
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# THE CANADIAN LAW TIMES.

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JANUARY, 1908.

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## LIFE INSURANCE AND OTHER CONTRACTS: WHERE JURISDICTION RESIDES, AND HOW FAR AFFECTED BY THE LAWS OF OTHER PROVINCES.

THE suing of an individual or a corporation in a foreign country involves less inconvenience now, owing to the facilities of travel, than formerly. On the other hand, in the vast increase of business, it may affect many more people. While the discomfort attending a suit in a foreign country will never disappear, yet the phase which on this continent gives more trouble to the lawyer than any other, is that the legislation of the country in which the action is brought may prove much different, if not more onerous than the home enactments. For this reason, it is of great importance to know how far contracts entered into in one of the Provinces of the Dominion are enforceable outside its jurisdiction, and by what law they are governed.

Jurisdiction, as stated by Lord Watson in *Hamlyn v. Talisker*, [1894] A. C. 202, is a pre-judicial question. When it is established, certain consequences follow the recognition of the right of the Court to enforce the contract.

### WHAT CONFERS JURISDICTION.

The prime fact may be said to be that residence within the territorial limit gives jurisdiction. Thus in *Re Busfield*, 32 Ch. D. 123, Lord Justice Cotton makes this remark, p. 131: "Service outside of the jurisdiction is an interference with

the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction."

In a later case, *Sirdar Gurdial Singh v. The Rajah of Faridkote*, [1894] A. C. 670, at p. 683, the Judicial Committee laid it down that all jurisdiction is properly territorial, and that territorial jurisdiction attaches, with special exceptions, upon all persons either permanently or temporarily resident within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory, and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. They further state that "in a personal action to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced."

See *Pennoyer v. Neff*, 95 U. S. 714; *Rand v. Hanson*, 154 Mass. 87; *Deacon v. Chadwick*, 1 O. L. R. 346.

There is one exception to that doctrine, and that is, that foreigners or foreign corporations may be sued here if they submit to the jurisdiction, but it has been pointed out that while the parties cannot by their agreement give jurisdiction which the Court does not possess itself, yet a contract may be made to provide for the jurisdiction of the Courts of a special country, and if that agreement forms part of a contract, the Court will enforce it. *The Moxham*, 1 P. D. 107, *Law v. Garrett*, 8 Ch. D. 26, and *Johnstone v. Machielsne*, 3 Camp. 44, decide that where the parties have chosen a home or foreign Court as their forum, it is the prima facie duty of our Courts to act upon that arrangement.

It may safely be considered that a foreign corporation with a general agent or manager within a Province of this Dominion (whether it is "foreign" in the sense of being incorporated by the Dominion of Canada, or by any other Province, with its head office out of this Province, or because it is formed by a foreign sovereignty) will be considered as resident within the jurisdiction where that general agent lives, or that office exists.

This appears from the following cases: *Newby v. Van Oppen*, L. R. 7 Q. B. 293; *Pattison v. Mills*, 2 Bligh N. C. 519; *Parker v. Odette*, 16 P. R. 69; *Re West Cumberland J. & S. Co.*, [1893] 1 Ch. 713; *McArthur v. Cornwall*, [1892] A. C. 75; *Harris v. Bank of B. N. A.*, 19 P. R. 51; *In re Benfield and Stevens*, 17 P. R. 300, 339; *In re Confederation Life Assn. and Cordingly*, 19 P. R. 16, 89.

If it has no office in Ontario or has only an agent with limited powers, the rule is, of course, different: *Pritchard v. Standard Ins. Co.*, 7 O. R. 188; *Armstrong v. Lancashire Ins. Co.*, 3 O. L. R. 395; *McArthur v. Macdonell*, 1 Man. L. R. 334; *Jones v. Scottish Acc. Ins. Co.*, 17 Q. B. D. 421.

There are to be found in *Rousillon v. Rousillon*, 14 Ch. D. 351, at p. 371, and in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, some more extended details as to the circumstances which may give the Courts of one country jurisdiction.

They are as follows:

1. When the defendant is a subject of that country.
2. When he was resident there when the action was begun.
3. Where he, as plaintiff, has selected the forum in which he is afterwards sued.
4. Where he has voluntarily appeared.
5. Where he has contracted to submit himself to the forum in which judgment was obtained.
6. And (possibly) where he has real estate within the jurisdiction in respect of which a cause of action has arisen while he was within the jurisdiction.

#### EFFECT OF LEGISLATION CONFERRING JURISDICTION.

Starting, however, generally, with the proposition that the Courts have territorial jurisdiction only, and that there must be sufficient residence within the jurisdiction to found

a right of suit, there are some domestic enactments which seem to render foreigners or foreign corporations amenable to their jurisdiction.

By our own Rules of Court jurisdiction has been assumed in several cases which would seem to depart from the principle of territorial jurisdiction. But wherever this occurs, then, although our Courts are bound by them (*Ellis v. McHenry*, L. R. 6 C. P. 228) and have jurisdiction to entertain the claim and to pronounce a judgment, yet it cannot be doubted that if the facts proved at the trial indicate to the Court that the real foundation of jurisdiction is wanting, the action would be dismissed. "The Legislature" (to quote the language of Lord Selborne, L.C., in *Berkeley v. Thomson*, 10 App. Cas. at p. 53) "has not said that a process served under the 4th section (of the Bastardy Act) is to give jurisdiction where there is no jurisdiction without it." See *Pennoyer v. Neff*, 95 U. S. 714, at p. 727.

The rules are rules of procedure only and are not intended to affect, and do not affect, the rights of parties: *British South African Co. v. Compagnie Mocambique*, [1893] A. C. 628.

For example, an action might well be brought against a foreigner under our Rule 162 (e) because a breach of a contract to be performed in this Province has occurred within it. But if it were proved that the parties were both foreigners and had in the contract provided that they would be bound only by the jurisdiction of the French Courts, or that by the law of the foreign country where both parties were resident its Courts had sole jurisdiction over them and their contracts (if made there), then it is conceived that the Court would hold that its jurisdiction was ousted.

If a judgment based on service under such a rule were pronounced or were obtained by default, then it would be open to question when proceeded upon elsewhere. Such has been the action of the New York Courts regarding such judgments, as appears from *Shepherd v. Wright*, 113 N. Y. 582.

Foreign judgments are only treated as evidence of a duty or obligation to pay the amount, and, as was said by Parke, B., in *Russell v. Smyth*, 9 M. & W. at p. 819, the Court which has to consider the effect of such service may receive evidence



of anything which negatives the duty or forms a legal excuse for not performing it.

The stream can rise no higher than its source, and if the Legislature of Ontario cannot adopt legislation affecting or binding aliens abroad, then it can confer no jurisdiction on its Courts to bind them by a judgment. It can and does, however, arm its Courts with sufficient jurisdiction to notify aliens abroad of proceedings taken against them, which, under some circumstances, it thinks ought to be determined in its Courts. But, if the jurisdiction thus conferred is not submitted to, its exercise is futile.

#### RELATIONS OF THE PROVINCES.

In respect to the different Provinces of the Dominion, the matter is slightly, though not fundamentally, different. All Canadians are British subjects, but though not aliens, are, if resident outside this Province, foreigners, in the sense of being outside the jurisdiction of our Courts. While an Act of the Imperial Parliament may give a Court jurisdiction over British subjects wherever they are, and while Acts of the Parliament of Canada will bind Canadians in the same way, the same cannot be said of the Acts of any Provincial Legislature as affecting the residents of any other Province. For the purposes of contract and suit they are foreign, and must be treated just as if they resided in a different country. Provincial jurisdiction in such matters is derived from the B. N. A. Act, and is confined to "Property and civil rights in the Province and to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

It would be an innovation to hold that a resident of Quebec could be sued in Ontario for a tort committed in Quebec, merely because he was a Canadian. But he can be sued in Ontario for a tort committed here by virtue of our Rules. He is treated as subject to jurisdiction only because he has, when within this jurisdiction, committed an unlawful act causing damage here—an act for which in his own Province he could not be made amenable, unless it were unlawful there—and thus giving rise to a breach of civil right in Ontario.

There seems no real difficulty in holding that each Province is a separate sovereignty, without power to affect those Canadians living outside its limits, except so far as international law warrants it. This is now the opinion of a Divisional Court in Ontario: *Deacon v. Chadwick*, 1 O. L. R. 346.

The modern view of the Canadian constitution is in favour of regarding each Province, as to its property and civil rights, as an independent state when contrasted with the Federal jurisdiction. It is only a natural extension of this well accepted principle to treat the inhabitants of the different Provinces as foreigners, in a legal sense, in relation to each other.

It is, of course, the only practical solution of the question of Provincial jurisdiction. It would be intolerable if the civil code of Quebec ran in this Province merely because we lived under the same flag and were British subjects. Those facts would make the Scotch and Irish subject to English law, and liable to suit anywhere in England. But though constituent members by representation of the Imperial Parliament these nationalities are preserved from undue inconvenience by statutes of that Parliament. Instances of this recognition of the rights of different provinces or kingdoms will be found in the following cases: *McArthur v. Macdonnell*, 3 Man. L. R. 9; *Braun v. Davis*, 9 Man. L. R. 534; *Tottenham v. Barry*, 12 Ch. D. 797; *Hawkesford v. Giffard*, 12 App. Cas. 122 (where an English judgment was treated as a foreign one in the Courts of the Channel Islands); *Robey v. Snaefall Co.*, 20 Q. B. D. 152; *New Zealand Loan Co. v. Morrison*, [1898] A. C. 349 (in which it is stated that proceedings in an English Court are proceedings in a foreign Court so far as the Victorian Courts are concerned). See also *Bateman v. Service*, 6 App. Cas. 386, and *Dominion Cotton Mills Co. v. General Engineering Co.*, [1902] A. C. 570.

#### THE LEX FORI.

If, therefore, the jurisdiction as between the several Provinces over their respective inhabitants is to be settled upon the principles of private international law, it will be easier to examine and come to a conclusion as to what Provincial laws apply to contracts which affect individuals or corporations resident or doing business in different Provinces, and

to what extent their provisions are annexed to such contracts. It may be premised that where the Court in any particular Province is accepted by both parties as having jurisdiction to enforce the remedy on a contract, there are certain laws of that Province to which all parties must submit. These are stated with some particularity in *Don v. Lippman*, 5 Cl. & F. 1 and 14. to be those of practice, procedure, evidence, and limitations.

In *Huber v. Steiner*, 2 Bing. N. C. 202, it is expressed thus: So much of the law as affects the rights and merits of the contract and all that relates *ad litis decisionem* is adopted from the foreign country, and so much of law as affects the remedy only and all that relates *ad litis ordinationem* is taken from the *lex fori* where the action is brought—and the laws of limitation belong to the latter.

There is a qualification suggested that if the limitation statute extinguish not only the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, and the parties are resident within the jurisdiction during all that period, so that it has actually operated, it becomes part of the construction of the contract.

In *Ferguson v. Fyffe*, 8 Cl. & F. 121, the principle is thus summed up. The law of the country where the contract is made or is to be performed furnishes the rule for expounding the nature and extent of its obligations. But the law of the country where it is sought to enforce it governs all questions of remedy and the mode of procedure, including the lapse of time.

#### INTENTION AS GOVERNING THE LEX CONTRACTUS.

But in the working out of the rights of the parties in that forum questions arise as to the validity and construction of the contract, the duties and obligations and the rights and remedies of the litigants, which are difficult of solution. In fact the test given as to what law applies to a contract between residents of separate states, where different systems of law prevail, is in itself the best illustration of the confusion attending this subject. It is "the intention of the parties in view of all the surrounding circumstances." Lord Herschell,

in *Hamlyn v. Talisker*, [1894] A. C. at p. 207, says: "Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. . . . In my view they are both matters which must be taken into consideration, but neither of them is, in itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. . . . In this case, as in all such cases, the whole of the contract must be looked at, and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of it."

In *South African British Brewers Co. v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273, is found an illustration of the minute circumstances which must be considered in determining the intention of the parties.

See also *Spurrier v. LaCloche*, [1902] A. C. 446, in which there is no mention of the suggestion, apparent from the language of Lord Herschell and Lord Ashbourne [in *Hamlyn v. Talisker*], that the law of intention applied to one whole contract may vary as to particular parts of it. No such distinction is apparent in any other decision.

#### RESULTS OF THE LAW OF INTENTION.

If, however, it be once settled that the law of one Province governs the contract and must be applied to it by the Court, other and scarcely less difficult problems arise. To take a concrete example. An insurance company issues its policy in Ontario in favour of the insured in Manitoba. The policy is payable to the insured's estate. While in Manitoba he

makes an indorsement on it declaring his wife the beneficiary. He moves to Nova Scotia and there purports to revoke it, and dies there. Now, no matter what law is applicable to the policy, that is, the contract of insurance between the company and the insured, the law of Manitoba as to the effect of the indorsement, and the law of Nova Scotia as to the validity of the revocation, must be considered, and as they are or may not be attributable to the intention of the contracting parties, different considerations are bound to arise.

In many cases, too, if the law of one Province is held to govern the contract as a matter of intention, it must be decided (1) whether stipulations in the contract govern which are valid there, but not where the action is brought; (2) whether the legislation of the Province attaches consequences to the contract unknown where it was made, or not forming part of the contract; and (3) whether rights given by that legislation to others besides the contracting parties are effective.

In the first case reference may be made to the case already cited of *Hamlyn v. Talisker*, [1894] A. C. 202. There an agreement in the contract provided for a reference of any dispute to arbitration by two members of the London Corn Exchange. It was decided that English law applied so far as this provision was concerned, and it was conceded that in Scotland such a provision was invalid. It was held that the Scotch Courts were bound to give effect to the arbitration clause, because, as pointed out by Lord Watson (p. 211), the jurisdiction was not ousted by such a stipulation. It deprived the Court of jurisdiction as to the merits of the case, but left it free to entertain it and to pronounce a decree in conformity with the award, or if the arbitration proved abortive, to hear and determine the action upon the merits. This is an important decision because it draws a distinction (which ought to be ever present in deciding such a point) between the remedy and the rights of the parties, and declares that the latter, as established by the contract, must prevail over the question of the procedure of the Courts. A fair deduction from it is that the law of the contract is binding upon the Court which enforces it as part of, and indeed the evidence of, the intention of the parties to it.

The second question is the subject of more authority. Speaking generally, the law to which the parties have submitted or that which, by intention, they are held to have adopted, will govern them. A familiar instance is the law of limitation of action, which is treated in *Don v. Lippman*, 5 Cl. & F. 1, as affecting the remedy and as part of the *lex fori*. This reason has been given effect to in *Finch v. Finch*, 35 L. T. 235; *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429; *Ferguson v. Fyffe*, 8 Cl. & F. 121.

In *Auber v. Steiner*, 2 Bing. N. C. 202, the qualification was pointed out that if the Statute of Limitation extinguished not only the right of action but the claim or title itself, then, and apparently only, if the parties were resident in the jurisdiction during all that period, so that the limitation has actually operated, it becomes part of the construction of the contract.

This qualification is not consistent with later cases. In *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 70, and in *Jacob v. Credit Lyonnais*, 12 Q. B. D. 589, the construction of the contract and its effect were held to be such an interpretation as would be put upon it according to the law which was held to govern it, having regard to the intention of the parties.

Another illustration is the effect of a discharge in bankruptcy releasing the obligation created by the contract (again affecting the remedy). In *Ellis v. McHenry*, L. R. 6 C. P. 228, this was held effective because binding on the Court, though elsewhere it would not be so if the governing law had not been submitted to. (See *Gibbs v. Société Industrielle*, 25 Q. B. D. 399.) In *Lloyd v. Guilbert*, L. R. 1 Q. B. 127, the plaintiff's claim was held to be barred by French law, to which the parties were held to have submitted themselves.

These cases do not directly involve the proposition that every enactment of the country whose law governs must bind the parties if it affects the remedy only.

But the decisions in *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96, *Dobie v. Temporalities Board*, ib. 136, and *Re Berryman*, 17 P. R. 537, appear to establish the principle that when jurisdiction is once agreed to (intention in that respect

governing), conditions annexed to the contract are binding. Examples may be found in the Manitoba statute 58 & 59 V. c. 21, s. 2, making all insurance moneys payable in that Province, and the Ontario statute R. S. O. 1897 c. 203, s. 143, which provides that the construction of contracts deemed by virtue of that Act to be Ontario contracts, should be according to the law of this Province, which makes the insurance moneys payable here. Of course, a contract not coming within the exact provisions of that clause would not be governed by it, but if the Court should hold that it was the intention that Ontario law should govern the contract, then its construction would be consistent with the purpose of the enactment. In such a case, the moneys would be payable not in Ontario, but where the contract provided; but the consequences of non-payment, if proved, would be such as Ontario law provided.

Re Berryman, 17 P. R. 537, though dealing with the payment of insurance moneys after the policy has become a claim, is a most important decision. Its effect is that Ontario legislation has provided a special mode for dealing with infants' shares in insurance moneys, and has ousted the rules of private international law on this subject, which would otherwise have given the moneys to the foreign tutrix.

It may then be fairly concluded that if, by intention, Ontario law applies, the various enactments adding obligations or annexing rights or disabilities to the contract, are part of the contract when enforced here.

The third proposition is less clear, as it raises the question whether rights given to others, some of them strangers to the contract, apply to or affect the parties to the contract.

Assignments of policies, declarations creating beneficiary rights, the title taken by purchasers, etc., are the most frequent examples of such interests. In *Lee v. Abdy*, 17 Q. B. D. 309, the Queen's Bench Division came to the conclusion that an assignment of an English policy was governed by the law of Cape Colony, where the assignment was made. This judgment proceeded upon the principle that the parties to the contract of assignment must have contemplated the application of the law of Cape Colony to it. In determining by what law its validity must be tested, it is evi-

dent from the cases previously cited, that the intention of the parties settled the question. And in that case it determined it as between the assignor and the insurance company. In *Toronto General Trusts Co. v. Sewell*, 17 O. R. 442, *Ferguson, J.*, followed *Lee v. Abdy*, and held that indorsements made in Ontario and under Ontario legislation affected the insurer. But the cases lack one element in common. It cannot be said that a declaration under the Ontario Act giving rights to a beneficiary, who perhaps knows nothing about it, can be governed by the law of intention. The insured executing the declaration is doing an act with intent that it shall be effective, but while he may intend it to operate under the law of the country where he then is, he may equally intend it to operate under foreign law. The difficulty is that he is creating rights as against the insurer who is not a party to his act. In *Lee v. Abdy*, Mr. Justice Wills supports his view by asserting that the original parties must be taken to have contracted subject to the incident that an assignment of the policy might be made anywhere, and that it would be governed by the law of that place. This seems to defeat the application of the real doctrine of intention, for if A. agree to pay B. on the happening of a certain event, and the Court looking at all the circumstances comes to the conclusion that the contract inter partes is governed by Ontario law, it is inconsistent with that to hold that at the same time they contemplated that the payee might give rights to one ascertained not by Ontario law, but by the law of some other country. Mr. Justice Willes puts the point very clearly in the following passage from *Lloyd v. Guilbert*, L. R. 1 Q. B. at p. 120: "It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby and cannot be decided as between strangers. In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume they have submitted themselves in the matter."

The cases of *Lebel v. Tucker*, L. R. 3 Q. B. 77, and *Bradlaugh v. Du Rin*, L. R. 3 C. P. 538, affirm that the original



contract cannot be varied by the law of any foreign country through which the instrument passes. The law applied as governing the interpretation of the contract was *lex loci contractus*, which was held to determine whether or not the indorsement in question operated as a transfer upon which the transferee could sue by that law. In the first case the contract was governed by English law, and the acceptor's bargain was, therefore, held to be that he would pay the holder who became such by an indorsement valid in England, though invalid according to the law of France where it was made. In the latter case, where French law applied, an indorsement, good by English but not by French law, was held not to give a right to the indorsee to sue in England.

These cases are not affected by the subsequent case of *Alcock v. Smith*, [1892] 1 Ch. 238, where the decision proceeds expressly on the title to the bill of exchange as a chattel, making the purchaser in a foreign country the lawful holder of it as a chattel, and therefore by English law entitled to sue. Story, in his work on the Conflict of Laws, puts it thus (8th ed., s. 317): He says: "For the transfer is not, as to the acceptor or the maker, a new contract, but it is under and a part of the original contract and springs up from the law of the place where the contract was made." Consistent with this is *Lloyd v. Guilbert*, L. R. 1 Q. B. 115, where the parties to a charterparty having submitted themselves to French law, the shipowner was held entitled to escape liability upon a bottomry bond [entered into by the master, his agent, and valid where it was made] because French law allowed him to set up as against it the right of abandonment. And in *Hamlyn v. Talisker*, [1894] A. C. 202, the law applicable to the contract being English, a provision invalid in the law of Scotland, where the contract was being enforced, was upheld. In *Re Megret*, [1901] 1 Ch. 547, *Cozens Hardy, J.*, held that the exercise of a power, in pursuance of an English settlement, was governed by English law, although made by a domiciled French woman in France. Of course the law applicable to the contract, where it is a question affecting rights created by an act done in a foreign country, must not be confounded with the law relating to the formalities of acts required to effectuate certain results. If a

transfer or other effective act is required to be executed in the presence of two witnesses and to be under seal, it is quite clear that, to be valid between the parties, those formalities must be adopted. But this would not determine that the formal act had created rights as against others. As Willes, J., says in *Bradlaugh v. Du Rin*, L. R. 3 C. P. at p. 542, the formalities of acts are governed by the law of the place. Alike in principle is the decision in *Colonial Bank v. Cady*, 15 App. Cas. 267, that while the acts necessary to transfer shares in an American company must be regulated by the law of the particular American State where it is domiciled, yet the rights arising out of a transaction entered into in England, but relating to the effect of what was thus formally done in America, must be determined by English law. And in *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, the Court of Appeal says of a power of attorney (p. 84): "The authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil." And further: "The extent of the authority (so given) in any country in which the authority is to be acted upon is to be taken to be according to law of the particular country where it is acted upon."

Setting out, however, with the proposition that, under the contract and by intention, the law of some particular country or province governs as between the insurer and insured, how is it when the insured attempts to create rights as against the insurer by an act invalid or not recognized by that law? In Ontario, for instance, if that law is applicable to the policy, a benefit to a wife cannot be revoked, but in Manitoba it can. Can an insured to whose contract Ontario law applies execute in Manitoba a revocation which will be valid? By Ontario law, a trust has been created by the insured, and in Manitoba he does something which, if effective, destroys it. If the result of revocation in Manitoba were to destroy or control the original contract, then it would offend against the law of Ontario as applied by intention to that contract. But if an act is done with relation to a chose in action in creating a right to or interest in that contract, but without destroying the contract or interfering with the law governing it, then only its formal validity must be determined apart from the law which governs

the validity, construction, nature, and obligation of the original contract. Mr. Justice Bain in *National Trust Co. v. Hughes*, 14 Man. L. R. 41, calls such an act "the exercise of a right or incident relating to the policy which belonged to the insured by the law of the place where he lived." This is in line with *Lee v. Abdy* and *Toronto General Trusts Co. v. Sewell*, but relies upon the personal capacity to create rights conferred by statute upon the insured under a policy which was held to be governed by Ontario law. Viewed solely in the latter light, that is, of personal capacity, it is of course open to the objection that the insured had agreed that the law of Ontario would apply to the contract. But it is clear that *Lee v. Abdy* proceeds upon a ground which defeats the question of intention, or so treats intention as if the law varied from time to time and under different circumstances, which Mr. Justice Willes in *Lloyd v. Guilbert*, at p. 127, calls "strange and unlikely." *Toronto General Trusts Co. v. Sewell*, however, follows it, and it is authority for the position that, although the contract is governed by foreign law, yet an indorsement validly made in Ontario, and invalid in the foreign jurisdiction, would give enforceable rights if the action were brought here. But it does not actually deal with that state of facts, because invalidity in Quebec was not proved, and the action was brought in Ontario, and naturally effect was given to its law. The decision in *National Trust Co. v. Hughes*, 14 Man. L. R. 41, is an advance upon both these cases, for in it the Court, while holding that the contract was governed by Ontario law, gave validity to an act performed by one party to it in another Province. Not, however, as in *Lee v. Abdy*, because in it the parties were held to have contracted subject to the possibility of an assignment anywhere as an incident of the contract, but because it was a right or incident relating to the policy which belonged to the insured by the law of the place where he lived. In other words, it allowed a payee to be brought into existence other than the one which the insured had contracted to pay. In this connection must be considered the decision in *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K. B. 660, where the limitations upon assignment of executory contracts are considered. The Court

there held that such contracts are only assignable where the consideration is executed, or where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it. Taking, however, the ground accepted by Mr. Justice Bain, it would appear that personal qualification or disqualification by positive municipal law may not be allowed to prevail in the Courts of another country, and the law of the domicile does not govern, but rather that of the act: Story's Conflict of Laws, 8th ed., ss. 104, 105; Worms v. DeValdor, 28 W. R. 346; Re Selot's Trusts, [1902] 1 Ch. 488.

In the case of *Miller v. Campbell*, 140 N. Y. 457, to which Mr. Justice Bain refers, the Court dealt with an assignment of a policy governed by Massachusetts law, and held its validity to depend upon the capacity of a married woman to make it under the laws of New York.

But capacity is part of the formal essential to validity, and at all events the giving of capacity to do an act cannot rise higher than the statute which gives certain effects and results to that act when done. Both depend on legislation, and legislation is part of the law of the country. So if the law of that country is applicable to the contract, the parties to it must necessarily be bound by it. The analogy to property, the right to which formed the basis of the decisions of *Cammell v. Sewell*, 5 H. & N. 728, and *Alcock v. Smith*, [1892] 1 Ch. 238, does not apply, for in *Lee v. Abdy* a policy of insurance was treated as a chose in action, and the assignment of it as an independent act having its validity determined on quite different grounds from that of situs.

To sum up these cases. *Lee v. Abdy* treats the validity of an assignment as depending on the law of the country intended by the parties to the assignment to apply to it. It also affects the insurer by assuming that he contracted with reference to such a law as the insured might agree with a third party should be applicable to dealings between them. *Toronto General Trusts Co. v. Sewell* treats the law applicable to a declaration as if it depended on intention, which it cannot do, and as if the insurer and insured had agreed that the effect given by the law of any place where the insured happened to be should apply to a contract governed by the law of another country through the intention of one of the parties to it. Na-

tional Trust Co. v. Hughes holds the insurer bound, not by the law he contracted in reference to, but by another law giving personal capacity to the insured where he then happened to be resident.

These cases all endeavour to make one law applicable by intention to the contract, and yet apply another law to ascertain the rights of others claiming through one of the parties to the contract. This has no warrant in any of the cases which have considered intention as settling the law which governs the contract.

Of course, the law of one country is sure to prevail in the Courts of that country, unless those Courts come to the conclusion that the parties to the contract have agreed to another law governing it, if the difference in the law is proved. If an action were brought here, then the *lex fori* would in some cases control even the agreement or curtail what might seem to be the rights of the parties. But, speaking broadly, the law applicable as determining the obligation and its legal meaning and effect should be ascertained by the Court according to its view of the intention of the parties.

It must be admitted that the subject is somewhat puzzling, and that it has not been made any clearer by the decisions in this Province or elsewhere. It is also evident that owing to the inconvenience that attaches to every transfer in a foreign country of a chose in action, it would be well if there were a universal rule touching the validity of assignments and other acts legalized by statutes which affect insurance policies and other contracts.

In any event, an enactment adopted by each Province which would settle the question would be an unqualified boon. But in the meantime every insurance company, at least, ought to adopt a form which would, by contract, settle its liability to those whose rights arise subsequent to the contract.

FRANK E. HODGINS.

Toronto.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Attorney-General.]**—While the merits of the question involved in *Boyce v. Paddington Borough Council*, 19 T. L. R. 38, viz., the right of the owners of an open space, subject to the provisions of the Metropolitan Open Spaces Acts, to put up a hoarding to prevent an adjoining owner from acquiring a right to the access of light, are not of importance in this Province, the case is worth noting because of the concise definition of the right of a private individual to sue, in respect of the interference with a public right, without joining the Attorney-General. And it is this: The right exists; first, where the interference with the public right is such that some private right of the plaintiff is at the same time interfered with—as, e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.—The cognate case of *Attorney-General v. Ashborne Recreation Ground Co.*, 19 T. L. R. 39, may also be noted, in which it is decided that where a by-law of a local authority required streets to be of a prescribed width, and imposed a penalty for a breach of the by-law, the Attorney-General might nevertheless restrain the breach by injunction.

**Bill of Exchange.]**—*Bank of Hamilton v. Imperial Bank*, 31 O. R. 100, 27 A. R. 590, 31 S. C. R. 344, is finally disposed of in 19 T. L. R. 56, the Judicial Committee agreeing with the view taken below that the case was one of money paid under a mistake of fact, and not one for the application of the technical rule as to notice of dishonour.

\*Including the cases in No. 5, Vol. 19, week ending 3rd December, 1902.

**Company.]**—*Mayor of Sheffield v. Barclay*, 19 T. L. R. 2, is an important decision as to the incidence of loss in the case of a forged transfer of shares. The defendants without negligence and in good faith accepted a forged transfer of shares of the plaintiff corporation to one of their firm, and at their request the plaintiff corporation, also without negligence and in good faith, registered the transferee as owner. Subsequently the shares were sold by the defendants and the purchasers were registered as owners and new certificates issued to them. In an action brought by the true owner against the plaintiffs, the transfer to the defendants' nominee was found to be a forgery and the plaintiffs were ordered to make good the loss. They were held entitled in this action to indemnity from the defendants, the principle applicable being, according to the Lord Chief Justice, that when one of two innocent persons must suffer, the one who has innocently put forward the request upon which the other has acted must bear the loss. He considered that, in view of the subsequent disposition of the case, the view of Lindley, J., to the contrary in *Simon v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188, was not binding upon him.—In *re Hiram Maxim Lamp Co.*, 19 T. L. R. 26, emphasizes the effect of a winding-up order. A shareholder, sued for calls, pleaded a set-off. Before trial the company went into liquidation. It was held that the ordinary rule applied and that as against the liquidator claiming payment of the unpaid balance of the shares the alleged set-off was of no avail. See the Winding-up Act, R. S. C. c. 129, and the notes thereto in *Masten's Company Law*.

**Constitutional Law.]**—The judgment of the Judicial Committee, reversing that of the Supreme Court of Canada, 31 S. C. R. 516, as to the extent of the jurisdiction of the arbitrators respecting Provincial Accounts upon questions affecting the Common School Fund, is reported 19 T. L. R. 46, under the already well-worn name of *Attorney-General for Ontario v. Attorney-General for Quebec*.—The judgment in *Ontario Mining Co. v. Seybold*, affirming that of the Courts below, 31 O. R. 386, 32 O. R. 301, 32 S. C. R. 1, is reported 19 T. L. R. 48.

**Contract.]**—Read v. Friendly Society of Operative Stonemasons, 19 T. L. R. 20, and Bulcock v. St. Anne's Master Builders' Federation, 19 T. L. R. 27, throw a good deal of light on the vexed question of the extent of the right to interfere between employer and employed. In the first case the Court of Appeal, varying the judgment of a Divisional Court—18 T. L. R. 577, noted 22 C. L. T. 263—held that the defendants—a trade union—were liable in damages to the plaintiff for compelling, under threat of a strike, his employers to discharge him. In the second case, the converse of the first, the discharged workman failed in his action against the Masters' Federation, who had, as he alleged, compelled his discharge because he had before entering the employment in question joined in a strike, the evidence failing, in the opinion of the Court, to shew any direct pressure by the defendants, or anything more than a *bona fide* exercise by the employers of their admitted right to terminate the plaintiff's employment.—Lumsden v. Barton and Co., 19 T. L. R. 53, is a "coronation" case. The plaintiff sued to recover the price of seats on a stand "to view the procession." Darling, J., distinguishing his own decision in Krell v. Henry, 18 T. L. R. 823, noted 22 C. L. T. 362, on the ground that the defendants had incurred expense in getting the seats ready, held that there had not been a total failure of consideration, and that therefore the action failed.

**Criminal Law.]**—In Smith v. Moody, 19 T. L. R. 7, a conviction under s. 7 of the Conspiracy and Protection of Property Act, 1875,—with which s. 523 of the Criminal Code is almost identical—for that the defendant, with a view to compel a person to abstain from working for another, unlawfully and wrongfully did injure his property, was held bad for not stating what the property injured was. An objection that the particular work abstained from should have been stated was overruled.—Tromans v. Hodgkinson, 19 T. L. R. 19, decides that a bookmaker, who went to the bar of a public house at stated hours and made bets with persons resorting there for that purpose, used the bar for the purpose of betting, and was therefore properly convicted under s. 3 of the Betting Act, 1853. See the Criminal Code, s. 197, as amended by 58



& 59 V. c. 40, and *Rex v. Hanrahan*, 3 O. L. R. 659.—In *Rex v. Pittwood*, 19 T. L. R. 37, a railway gate-keeper, who had forgotten to shut the gate at a crossing, so that a man drove upon the line when a train was approaching and was killed, was held to have been rightly convicted of manslaughter. The contention that for his breach of duty the gate-keeper was answerable to his employers (the railway company) alone, was held to be untenable.

**Estoppel.]**—Section 102 of the Larceny Act, 1861,—s. 157 of the Criminal Code being to the same effect—provides that any one publicly advertising, or printing or publishing an advertisement of, a reward for the return of stolen property, using any words purporting that no questions will be asked, is liable to a penalty of £50 to be recovered by action. The plaintiff in *Nutt v. Sol Syndicate*, 19 T. L. R. 27, had recovered judgment in another action against the supposed publisher of a paper in which an illegal advertisement had appeared. It was held that he was estopped in this case from contending that the defendant in the former action was not the publisher and that the defendants in this action were the publishers. Compare *Toronto Dental Mfg. Co. v. McLaren*, 14 P. R. 89; *Keating v. Graham*, 26 O. R. 361.

**Fixtures.]**—The question of fixtures as between mortgagee and conditional vendor of the mortgagor is again elaborately dealt with by the Court of Appeal in *Reynolds v. William Ashby and Son*, 19 T. L. R. 70, and the articles in question—machines worked by steam and fastened by bolts and screws—were held to have become subject to the mortgage.

**Gas Company.]** — That an automatic slot meter is the agent of its owner to receive payment for the wares supplied by it is the short and perhaps fairly accurate way of putting the point decided in *Edmundson v. Mayor of Longton*, 19 T. L. R. 15, a case placed under the heading of gas company because of the (legally speaking) accident that gas was the commodity supplied by the particular machine the scope of the agency of which was under consideration. The customer duly placed in the machine his shillings from time to time, and without negligence on his part the shillings were felon-

iously abstracted. It was held that the loss fell upon the gas company and that the customer was not bound to pay again.

**Husband and Wife.]**—The judgment in *Morel Brothers v. Westmorland*, 18 T. L. R. 599, noted 22 C. L. T. 263, as to the wife's authority to pledge the husband's credit, was reversed by the Court of Appeal, 19 T. L. R. 43, chiefly on the ground that the liability was a several liability of either husband or wife, and that having elected to sue the wife the plaintiffs could not also sue the husband.

**Infant.]**—The judgment of the Court of Appeal in *Thurstan v. Nottingham Permanent Benefit Building Society*, 18 T. L. R. 135, noted 22 C. L. T. 29, as to the liability of an infant on a mortgage, was affirmed by the House of Lords: 19 T. L. R. 54.

**Insurance.]**—The judgment in *Stuart v. Freeman*, 18 T. L. R. 511, noted 22 C. L. T. 210, as to the effect of payment of a premium for life insurance after the life had dropped, was reversed by the Court of Appeal: 19 T. L. R. 24. The Court of Appeal held that there was evidence to justify the finding that there was an implied right to thirty-one days of grace, and got over the difficulty of the death on the thirty-first day before the actual payment by the nice distinction that the payment in question was that of a quarterly instalment on a policy previously renewed for a year subject to payment of four quarterly instalments, and therefore not *ipso facto* terminated by the death.—In *re Williams and Lancashire, etc., Ins. Co.*, 19 T. L. R. 82, is an important decision in these days of employers' liability insurance. A policy of that nature provided that the employers should give "immediate notice to the company of any accident causing injury to a workman," and time was to "be deemed to be the essence of this condition." The accident in question happened on the 10th of October, and the notice proved (an alleged informal oral notice not being given effect to) was the forwarding to the company on the 4th of December of the formal demand for compensation served by the workman on the employers on the 1st of December. It was held that the

condition had been broken and that the employers could not obtain from the company indemnity against the compensation awarded to the workman. Compare with this *Shera v. Ocean Accident and Guarantee Corporation*, 32 O. R. 411.

**Landlord and Tenant.**]—The question in *Jones v. Livingston*, 19 T. L. R. 77, was whether by agreeing to “let” premises the lessor impliedly covenanted for quiet enjoyment. The Court of Appeal, applying *Baynes v. Lloyd*, [1895] 2 Q. B. 610, held that at all events there was no implied covenant as against a title paramount—which was the case in judgment—and evidently inclined to the view that there was no implied covenant even as to the lessor’s acts. It was contended by the plaintiff that there had been by the lessor an oral warranty as to the permissible mode of user of the premises, eviction having taken place at the instance of the head landlord because of mis-user. This contention was held, however, not to have been made out, and in addition the Court pointed out that such a question could not be dealt with by collateral warranty, but was part of the subject matter of the contract.

**Master and Servant.**]—The judgment in the somewhat novel case of *Lloyd v. Woodland Brothers*, 18 T. L. R. 578, noted in some detail, 22 C. L. T. 264, was reversed by the Court of Appeal, 19 T. L. R. 32, that Court being of opinion that there was no evidence to justify the findings of the jury, especially the finding that the lift was defective because of the absence of an inner gate, based as it was entirely on a view of a plan of the lift in question. The importance of the pleadings and particulars in a case of this kind is indirectly emphasized, and there is a useful discussion of what must be made out to justify recovery.—*Worthington Pumping Engine Co. v. Moore*, 19 T. L. R. 84, is an interesting case as to the right of a servant to inventions made by him during the term of his employment in relation to the articles dealt in by the employers. Admitting the general principle that the mere existence of a contract of service does not *per se* disqualify a servant from taking out a patent for an invention made by him during his term of service, even though the invention may relate to subject matters germane to and useful for his

employers' business, Byrne, J., held that, having regard to the nature and scope of the defendant's employment, and the special trusts and duties imposed on him, he could not hold his patents as against his employers.

**Municipal Corporations.**—The highway obstruction case of *Bull v. Mayor, etc., of Shoreditch*, has made a second appearance in the Court of Appeal: 19 T. L. R. 64. That Court had previously directed a new trial—18 T. L. R. 171, noted 22 C. L. T. 70—and now, reversing the judgment at the second trial, entered judgment for the plaintiff, there being, in the view of the Court, a breach of the defendants' duty to keep the road in repair, and therefore liability for the accident resulting from the plaintiff, in avoiding the part out of repair, driving into a heap of earth placed on another part of the road by other persons over whom the defendants had no control.—In *Dublin United Tramways Co. v. Fitzgerald*, 19 T. L. R. 78, another highway case, a tramway company were held liable in damages for an accident resulting from the slippery condition of the portion of the highway between the tracks, the company being bound (by special statute) to keep that portion "in good condition and repair."—Power to provide and maintain urinals "in proper and convenient situations," was held, in *Leyman v. Hessele Urban District Council*, 19 T. L. R. 73, not to justify the defendants in placing a urinal so near the plaintiff's premises, as to be, as was found on the evidence, a nuisance to him.

**Partner.**—The judgment in *Hamlyn v. John Houston and Co.*, 18 T. L. R. 631, noted 22 C. L. T. 265, holding a firm liable in damages because one of the partners had obtained by bribery information as to a rival business, was affirmed by the Court of Appeal: 19 T. L. R. 66. "A principal may be held liable for the fraud or other unlawful acts, and even the crimes of his agent, committed in doing something which was legitimately within the scope of his authority."

**Power of Appointment.**—In *re Lawley, Zaiser v. Lawley*, 19 T. L. R. 8, is an unusual case as to the effect of exercising a power of appointment. The donee of a general power of appointing a fund by will attempted to exercise the power

in favour of a creditor; but it was held that the fund became upon his death part of the general estate of the testator and applicable in payment of debts generally. The creditor took only, so the Court held, under the will, and his position was really that of a legatee taking the bounty of the testator.

**Sale of Goods.**]—The contract in question in *Ryan v. Ridley and Co.*, 19 T. L. R. 45,—for the sale of perishable goods.—provided that payment was to be made by cash in exchange for the shipping documents. It was held that this meant payment within a reasonable time (in a business sense) after tender to the purchaser of the documents and that in default the vendor was entitled to re-sell and recover from the purchaser the loss on such re-sale.—*Clarke v. Army and Navy Co-operative Society*, 19 T. L. R. 80, was decided by the Court of Appeal on the far-reaching principle that a seller of goods of a possibly dangerous character is bound to warn a purchaser, who does not himself know it, of the danger. The plaintiff purchased a tin of a preparation of lime, and owing to some defect in the tin some of the lime, when the tin was opened, flew in her eyes. In the opening of other tins of the same consignment similar accidents had, to the defendants' knowledge, occurred, and they were mulcted in damages.

**Service out of Jurisdiction.**]—The *Duc D'Aumale*, 19 T. L. R. 42, 87, was an action for damages from collision between the plaintiffs' English vessel and the defendants' French vessel while the latter was in tow of an English tug. It was held that as there was a right of action against the owners both of the tug and of the vessel, the owners of the latter were proper parties, and service out of the jurisdiction of notice of the writ was allowed.

**Solicitor.**]—The judgment of Kekewich, J., in *Wright v. Carter*, 18 T. L. R. 256, noted 22 C. L. T. 101, dismissing an action to set aside certain conveyances from client to solicitor, was reversed by the Court of Appeal, 19 T. L. R. 29, that Court being of opinion that the client had not the competent independent advice which is essential to the validity of such a transaction.

**Statute of Frauds.]**—That “do”—for ditto—may be a sufficient signature (by auctioneer as agent) to satisfy the statute is the point decided in *Reynolds v. Hooper*, 19 T. L. R. 33. In a sale catalogue the auctioneer wrote the name of the purchaser opposite the description of certain goods bought by him, putting opposite the description of the next parcel of goods, also bought by the same man, the word “do.” This was held sufficient.

**Succession Duty.]**—An important question as to the Quebec Succession Duty Act was dealt with by the Judicial Committee in *Lambe v. Manuel*, 19 T. L. R. 68. By that Act a tax is payable on “all transmissions owing to death, of the property in, usufruct or enjoyment of, movable and immovable property in the province.” It was held that the tax was payable only on property which the successor claimed under or by virtue of Quebec law, and therefore not in respect of property of a testator resident in Ontario consisting of (1) bank shares in a bank having its head office in Montreal; (2) bank shares in the Montreal register of a bank having its head office in Toronto; and (3) a debt secured by mortgage on land in Montreal.

**Trademark.]**—*Bourne v. Swan*, 19 T. L. R. 59, while deciding nothing new, puts in a neat form some of the principles to be applied in contests as to pictorial trademarks. The issue in such a case is whether the defendant’s trade-mark is calculated to deceive the public into believing that the goods to which it is applied are those of the plaintiff. Intention on the part of the defendant to deceive, or actual misleading of a purchaser, need not be proved, and the Judge is entitled to decide whether, having regard to the trademarks in question, there is such a resemblance between them as is calculated to deceive. In *Provident Chemical Works v. Canada Chemical Manufacturing Co.*, 22 Occ. N. 381, and *Grand Hotel Co. v. Wilson*, recently decided by the Court of Appeal for Ontario, —to be reported in 4 O. L. R.—many of the cases on this subject are referred to.

## EDITORIAL REVIEW.

**The Exchequer Court Reports.**

A correspondent suggests that the Law Society of Upper Canada should provide for supplying the members of the society in good standing with the reports of cases in the Exchequer Court of Canada as well as the Supreme Court reports. Possibly the Benchers may have supposed (if they considered the matter) that there was no great demand for reports of Exchequer cases. Our correspondent thinks that Crown cases, shipping cases, trade-mark cases, and particularly patent cases, are of general interest and importance, and that at all events a very considerable number of practising barristers would like to have the reports. It is not easy to see why any distinction should be made between the two sets of Dominion reports, if there is really a desire on the part of the profession generally to have both, and provided the funds will warrant an increased expenditure. This would not be very great, as the cases decided in the Exchequer Court of Canada make up only about two volumes in three years. In this issue of the Occasional Notes we print at length, in advance of the regular issue, an important judgment of the Court. We may add that the Exchequer cases are reported and edited with great care and ability.

**County of Huron Judicial Changes.**

Mr. Masson, Judge of the County Court of Huron, has retired on account of ill health; Mr. Doyle, junior Judge, has been promoted to the senior judgeship; and Mr. Philip Holt, K.C., of Goderich, has been appointed junior Judge. Mr. Holt's appointment is well spoken of, but it is a pity that in his case a policy enunciated some years ago has been departed from by the Dominion government. It is better that a man should not become local Judge in the county where he has practised as a solicitor. It is not necessary to suggest that a Judge will be influenced by his former associations. If any

person thinks or suspects that a Judge is so influenced, the administration of justice is weakened in the estimation of the public. If nothing had ever been said or written as to the advisability of appointing as Judge for a particular county a barrister who had not practised in that county, if a practice in that regard had not been established and followed, there would be less reason for complaint.

### **The Testimony of Experts.**

Surgeon Ormsby, the president of the Royal College of Surgeons of Ireland, in his opening address recently delivered to the surgical section of the Royal Academy of Medicine, dealt with a question that is of considerable present interest to Judges and lawyers—namely, the conflict of medical testimony in courts of law. Now-a-days jurists are beginning to search their consciences as to the legal propriety of expert testimony of any sort, and the question discussed by Surgeon Ormsby is very à propos. Expert partisanship has grown to such proportions in the Irish courts that a patient recently was represented as lying helplessly in bed, suffering from the injuries produced by a collision of his bicycle with a passing car, when as a matter of fact he was actually shooting on the Dublin mountains. That, of course, was an exceptional case of medical enthusiasm; but the ordinary “shock cases” that are to be heard every day in the courts, in which medical testimony is adduced on each side of a most contradictory character, present sufficiently strange elements for consideration. Surgeon Ormsby’s explanation of the diversity of medical opinion is that in many instances the doctor is misled. Sometimes he is deliberately deceived by the patient, and often the visit of a presumably hostile expert has such an effect on the mind or nerves of a patient that he involuntarily deceives the doctor. In other instances, medical men are led on by excitement of the litigation, or the subtlety of counsel, to give a more decided opinion of a particular case than they would if they were giving it in their consulting-room. Whatever be the explanation, Surgeon Ormsby’s solution of the problem is clear and intelligible. He thinks that in all actions for personal injuries the Court should be assisted by a medical assessor of undoubted knowledge and eminence,



who would aid the Judge to estimate and weigh the expert evidence pro and con. There are some who will think that this would make confusion worse confounded. However, the only alternative seems to be the rejection altogether of expert testimony.—*The Law Times*.

### **Popular Election of Judges.**

It is said that in the recent election in the State of New York, there were several instances of the defeat of candidates of the dominant party for judicial positions. This is referred to by *Case and Comment* as an indication of a purpose on the part of the voters to choose their Judges without much regard to politics. In that light and to that extent their action is encouraging to those who believe in the policy of an elective judiciary. But, even supposing that the electors generally exercised the franchise without political bias, and voted for the men they deemed best fitted to be Judges, would the best results be arrived at? Is the average elector competent to decide upon a candidate's qualification for the Bench? It may be that Judges appointed by governments on partisan grounds will be no better than Judges elected by popular vote on partisan grounds. But if the electors can free themselves from party bias, why should not the government? If Judges were appointed by the government of the day absolutely without regard to politics, the best men would naturally be chosen, for the government always has at its command the means of informing itself as to qualifications, and there would be no temptation, if political exigencies were not considered, to depart from the straight course.

### **Recent American Decisions.**

*Bank*.—A depositor who, by negligence in failing to detect forgeries among the vouchers returned by the bank and to give the bank notice thereof, causes loss to the bank either by enabling the forger to repeat his fraud, or by depriving the bank of an opportunity to obtain restitution, is held, in *Critten v. Chemical National Bank* (N. Y.), 57 L. R. A. 529, to be responsible for the damage caused by his default.

*Broker*.—Refusal to comply with a contract to purchase real estate, by reason of which the broker who negotiated the

sale is deprived of his commission, is held, in *Livermore v. Crane* (Wash.), 57 L. R. A. 401, to render the intending purchaser liable for the damages thereby inflicted on the broker, although he had agreed to look to the seller for his commission.

*Carriers.*—Injury to a passenger by reason of the unsafe condition of the depot premises, which the passenger must use to reach his train, is held, in *Herrman v. Great Northern R. Co.* (Wash.), 57 L. R. A. 390, to render the carrier liable, notwithstanding the fact that the premises are used by and are in possession of a union depot company or its receiver, with whom the railway company contracts for terminal facilities.

A carrier's contract limiting liability for loss to a specified amount is held, in *Rosenthal v. Weir* (N. Y.), 57 L. R. A. 527, to have no application to the damages to be recovered for its failure to comply with a notice of stoppage in transitu after it had agreed to do so.

An agreement by a passenger, when procuring a mileage ticket at a reduced rate, not to hold the railway company liable for injuries received while riding on freight trains, is held, in *Richmond v. Southern Pacific Co.* (Or.), 57 L. R. A. 616, to be unenforceable with respect to such freight trains as are designated by the carrier to carry passengers generally.

The voluntary exposure of the body beyond the sides of a moving train, by a passenger riding on the platform, is held, in *Benedict v. Minneapolis and St. L. R. Co.* (Minn.), 57 L. R. A. 639, to be such negligence as will preclude recovery for his death, caused by coming in contact with an iron post near the track.

*Criminal Law.*—Grabbing a purse from one's hand so quickly that he has no opportunity to resist is held, in *Jones v. Com.* (Kentucky), 57 L. R. A. 432, to involve sufficient force to constitute robbery. With this case is a note reviewing the other authorities as to what force is sufficient to constitute a robbery.

*Defamation.*—A communication transmitted by a commercial agency, that a certain person had made an assignment for the benefit of creditors, when the information received by it was that he had made an assignment to secure

the indorser of a note, is held, in *Douglass v. Daisley* (C. C. A. 1st C.), 57 L. R. A. 475, not to be privileged as a matter of law.

*Fixtures.*—Heating apparatus bought by a man under a contract reserving title to the seller, and permanently placed in a building owned by himself and his wife by entireties, is held, in *Schellenberg v. Detroit Heating and Lighting Co.* (Mich.), 57 L. R. A. 632, not to become a fixture so as to prevent its removal for non-payment of the purchase money, if removal will not materially injure it or the building.

*Insurance.*—Under a statute requiring insurance commissioners to issue a license to a foreign insurance company to do business in the state, if satisfied with its statement shewing its financial condition and standing, it is held, in *Bankers' Life Ins. Co. v. Howland* (Vt.), 57 L. R. A. 374, that the commissioners have no authority to question the method of computing the reserve set forth in the statement, or to enter upon an independent valuation of such reserve.

The interest of the assured in a twenty-year distribution policy of insurance on his life, which will cease on his failure to pay premiums, is held, in *Boisseau Use of Robinson v. Penn.* (Va.), 57 L. R. A. 380, not to be an estate within the meaning of a statute making an execution a lien, from the time it is placed in the hands of the officer, on all the personal estate of or to which the judgment debtor is, or may afterwards and before the return date of the writ become, entitled.

A life insurance agent is held, in *Tomsecek v. Travellers' Ins. Co.* (Wis.), 57 L. R. A. 455, to have no implied authority to accept as payment of a premium on a policy an agreement to give him credit upon his individual account, which he shall trade out with the insured in the ordinary course of business.

An infant is held, in *O'Rourke v. John Hancock Mut. L. Ins. Co.* (R. I.), 57 L. R. A. 496, not to be bound by his warranties in a contract for life insurance.

The surrender of an insurance policy to the insurer for its cash value is held, in *Pippen v. Mutual Benefit Life Ins. Co.* (N. C.), 57 L. R. A. 505, not to be a sale which can be disaffirmed by the administrator of the insured, on the ground

of the latter's infancy, but to be merely a rescission of the contract. With this case is a note collating the authorities as to insurance on the life of a minor.

The loss to be made good under a policy of fire insurance is held, in *Pennsylvania Co. v. Philadelphia Contributionship (Pa.)*, 57 L. R. A. 510, not to be limited to the cost of replacing the structure described in the survey, if, when the fire occurs, the statutes require, as a condition of rebuilding, more substantial and expensive structural work.

A policy insuring a railway company against loss from liability to persons who should accidentally "sustain personal injuries" on its road under circumstances which impose upon the insured a common law or statutory liability for the injuries is held, in *Worcester and S. Street R. Co. v. Travelers' Ins. Co. (Mass.)*, 57 L. R. A. 629, not to cover cases of instantaneous death without conscious suffering through injuries for which insured is responsible, where the statutes give a new right of action to the personal representative in case of death, and not a right of action to deceased, which survives.

An agreement by an applicant for life insurance, that the medical examiner appointed and paid by the insurer shall be the agent of the applicant in recording the medical examination, is held, in *Sternaman v. Metropolitan Life Ins. Co. (N. Y.)*, 57 L. R. A. 318, to be prohibited by public policy.

An insurance company is held, in *Taylor v. Anchor Mut. F. Ins. Co. (Iowa)*, 57 L. R. A. 328, not to be able to defeat liability on its policy because of misrepresentations in the application as to the title to the property or the incumbrances thereon, if they were correctly stated to the agent and he failed to make out the application in accordance with the information given.

*Master and Servant.*—The negligent act of a foreman with general control and authority to employ and discharge workmen, in ordering a subworkman upon an elevator, and himself operating the elevator with negligence, to the workman's injury, is held, in *Swift & Co. v. Bleise (Neb.)*, 57 L. R. A. 147, not to be the act of a fellow-servant, but of a vice-principal.

Injury received by a young man seventeen years old while helping brakemen, at their request, to load a piano, is held, in *Cincinnati, N. O. & T. P. R. Co. v. Finnell* (Ky.), 57 L. R. A. 266, to be within the rule which exempts the master from liability to one who is injured while helping his servants, at their request, by reason of their negligence.

**Negligence.**—A presumption of negligence on the part of an electric company is held, in *Boyd v. Portland General Electric Co.* (Or.), 57 L. R. A. 619, to arise when injury results to a traveller in a public street from one of its live wires, which has broken and is hanging so near the ground as to be within reach therefrom.

Proof that an electric-light wire controlled by a private corporation, and normally suspended upon poles along a public street, was trailing broken on the sidewalk, is held, in *Newark Electric Light and Power Co. v. Ruddy* (N. J. Err. & App.), 57 L. R. A. 624, to afford a presumption of negligence, in a suit against such corporation by a person injured through electric shock by coming in contact with such wire.

From the fact that a quiet, gentle horse was left standing untied in the public street, free from the presence of anything which might frighten or disturb him, it appearing that the driver had been accustomed to use the horse in that way for many years without an accident, it is held, in *Belles v. Kellner* (N. J. Err. & App.), 57 L. R. A. 627, that no inference can arise that the act was negligent.

**Nuisance.**—The maintenance of a tower by a landowner on his land in such a way that ice formed on it, from freezing rain or spray from a cataract, falls on to adjoining property so as to injure it and endanger human life, is held, in *Davis v. Niagara Falls Tower Co.* (N. Y.), 57 L. R. A. 545, to be properly enjoined.

**Will.**—Revocation of a will is held, in *Cutler v. Cutler* (N. C.), 57 L. R. A. 209, to be effected by adopting its mutilation as such.

## BOOK REVIEWS.

**MacMurchy and Denison's Canadian Railway Cases.**—A selection of cases affecting railways recently decided by the Judicial Committee of the Privy Council, the Supreme and the Exchequer Courts of Canada, and the Courts of the Provinces of Canada, with notes and comments, by Angus MacMurchy and Shirley Denison, of Osgoode Hall, Toronto, Barristers-at-law. Volume 1: Toronto: The Canada Law Book Co.: 1902.

This work will be found of great practical value to the active practitioner in the Courts throughout Canada.

It covers substantially the heads under which on circuit most railway cases range themselves.

The most fruitful source of litigation, and the one in which solicitors are oftenest consulted, so far as railways are concerned, is :

Injuries at railway crossings. Upon examination of the cases collected upon this subject, one is struck with the completeness with which the compilers have covered the ground. No counsel could usefully add anything to the collection made, either upon the various ways in which the plaintiff can frame his case to cover neglect of the company, or upon the manner in which he can utilize such alleged neglect as a shield for his own admitted neglect to use his senses of sight and hearing. The inclusion of the Quebec authority, *Girouard v. Canadian Pacific R. W. Co.*, at p. 343, is, perhaps, a mistake, as it gives an entirely erroneous view of railway law, which had crept into Quebec jurisprudence, and which the decision of *Roy v. Canadian Pacific R. W. Co.*, by the Privy Council, reported at p. 196, has corrected. However, the case shews an ingenious endeavour to throw the whole question of what is or is not the duty of the railway company into the hands of the jury and leave the company to the "vicarious sympathy of the twelve." Whatever the rules which bind the company are, they should be settled by statute or rules framed under ss. 214-222 of the Railway Act, and no rule which might be so passed by Parliament or the Governor-in-Council could be so oppressive as the uncertainty of what might or might not

be considered proper by twelve jurors utterly ignorant of the considerations involved in the question of what is proper railway practice.

The next most canvassed liability in railway practice is, perhaps, that towards the employees, and here again the text contains practically every case required for actual practice. No doubt the authors will in future supplement the present work, and in doing so will add certain decisions on the construction of the Railway Act itself, under the general heading of "Working of the Railway."

The cases on the subject of the liability of railway companies as carriers, regulated as it is by s. 246, are (with the exception of *Macdonald v. Grand Trunk R. W. Co.*, 31 O. R. 663, which seems to have been overlooked) all embraced. These are particularly valuable for the general practitioner, who is most apt to be led utterly astray by reading either English or American text books, unless he bears well in mind the distinctions between the cases under the English Railway and Canal Traffic Act, the American so-called "Public Policy" type of decision, and the decisions under our own Act. This little collection of cases under our own Act will keep the practitioner on safer ground in this country than any other work we have seen.

On the subject of rights of passengers the text is well thought out, but we should like to have seen one or two leading cases on the rights involved in taking "Pullman" passage, which is now often a very practical subject of advice, and one on which much confusing law exists.

The farmer's rights in respect of cattle and horses injured by reason of defective fences and cattle-guards can be advised on in any respect by any person who will read the cases collected, and as this class of case is most often up in the Division Courts, where hitherto the variety of view reported as being entertained, has been most diverse, let us hope the decisions in future will, with this collection, be more consistent in different parts of the Province.

The other heads dealt with are farm crossings, jurisdiction of railway committee, fire claims, nuisances, compensation for property taken, bridges, etc., from which no case of practical value to the thorough understanding of the subject

treated; so far as our Railway Act is concerned, has been omitted.

The book is recommended to any member of the profession who is called upon to advise on or conduct a case against a railway company in Canada, as giving him substantially all the leading cases which are of practical value upon the subjects treated.

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WALLACE NESBITT.

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**The Impeccancy of the King.**—A Study of Sovereignty, by Charles Morse, D.C.L.

This brilliant essay, a part of which was printed in the October number of the Canadian Law Times last year, has been published in pamphlet form as part of Transactions No. 3 of the Ottawa Literary and Scientific Society.

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**The Madras Legal Companion.**—Edited by P. Vencata Rau. Vizagapatam, India: May, 1902.

The third number of an enterprising monthly legal journal, full of strange law.

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**The Natal Law Quarterly.**—Edited by Wm. T. Lee. Durban: June, 1902.

An excellent legal periodical.

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**American Law Review.**—Edited by Seymour D. Thompson, St. Louis, and Leonard A. Jones, Boston. St. Louis, Mo.: Review Publishing Co.: November-December, 1902.

This number contains, among other interesting articles, a capital paper by Judge McClain, of the Supreme Court of Iowa, on "The Evolution of the Judicial Opinion."

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**Harvard Law Review.**—Cambridge: The University Press: December, 1902.

"A Statement of the Trust Problem," by Robert L. Raymond, is the title of the leading article in this number.

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**The Legal Diary for 1902.**—Toronto: The Carswell Co., Limited.

A very useful book, containing much information, and large blank spaces for daily memoranda, monthly accounts, etc.



# THE CANADIAN LAW TIMES.

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FEBRUARY, 1903.

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## NOTICE OF DISHONOUR.

A NOTICE of dishonour must be given by or on behalf of the holder, or on behalf of an indorser, or by an agent of the holder: Bills of Exchange Act, s. 49. The agent may give the notice in the name of his principal, or in his own name, and the holder need not be interested in the bill or note: s. 49, s.-s. 2. The expression "holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof; a person to whom a bill is sent for collection is a holder: *Allison v. Central Bank*, 4 Allen N. B. 270.

If the notice is given on behalf of the holder, it enures for the benefit of all prior or subsequent parties to the bill: s. 49 (c); and if the indorser gives such notice it enures for the benefit of the holder and all indorsers subsequent to the party to whom the notice is given: s. 49 (d).

The notice may be in writing, or by personal communication, and in any terms that may identify the bill. It has been held in the United States that a notice by telephone is sufficient: *Thompson v. Appleby* (Kansas S. D. C. A., 1897), 48 Pac. R. 933. The difficulty of identifying the party spoken with makes such a method of communication dangerous. A telegraphic communication should also be sufficient and better than the telephone.

A letter with a notice of dishonour was forwarded in time to the wrong branch bank. Next day a telegram was sent to the proper branch, which sent off its notices in time. It was held that the bank had received due notice of dishonour. *Collins, L.J.*, dissented, holding that for the purpose of notice

of dishonour the branches of a bank must be regarded as distinct, that the written notice by the London bank, not having been sent to their principals, was ineffective, and could not be made effective by the telegram, which was out of time: *Fielding v. Corry*, [1898] 1 Q. B. 268.

Upon the same reasoning as the above decision a telegraphic notice of dishonour, which would reach the party entitled to notice as soon as a mailed notice, would be sufficient, although sent after the time such notice should have been posted. It is possible that the Court thought that, as the party to whom notice had been sent had not suffered by any laches of the holder, he had nothing to complain of. It is doubtful if this decision would be law in Canada, for the English Act says that the notice must be sent within a reasonable time (see English Act, s. 49, s.-s. 12); ours, not later than the next day after the dishonour of the bill.

For commercial purposes the English rule established by *Fielding v. Corry* is the best, for the party receives the notice quite as soon, if not sooner, than the mailed notice, and is not in any way damaged.

The return of the bill to the drawer is a sufficient notice to him (f). The return of the dishonoured bill to an indorser is a sufficient notice to him.

A notice need not be signed, and an insufficiently written notice may be supplemented by an oral notice. A misdescription of the bill will not invalidate unless the party is in fact misled thereby. Describing the bill as payable at S. Bank, when it is payable at T. Bank: *Bromage v. Vaughan*, 9 Q. B. 608; a note as a bill of exchange: *Stockman v. Parr*, 11 M. & W. 809; transposing the names of the drawer and acceptor: *Mellerish v. Rippen*, 7 Ex. 578; describing acceptor by wrong name: *Harpman v. Child*, 1 F. & F. 652: may be sufficient.

And generally it may be stated that notices of dishonour are construed liberally: *Chalmers*, 158.

A notice may be given to an agent for his principal (h), but in the case where the agent represents two principals the Court has to be satisfied that when the agent received the notice he acquired the information under such circumstances

as that it was his duty to communicate it to himself in his other capacity: *Deep Sea Fishery Company's Claim*, [1902] 1 Ch. 507. The proper way would be for the holder to serve notices for both parties on the agent (c).

In a case where the party to a bill had assigned for the benefit of his creditors, it was held in the United States that a notice left at the office in charge of his trustee was sufficient: *Bank of America v. Shaw*, 142 Mass. 290; *American National Bank v. Junk*, 28 L. R. A. 492; *contra*, *House v. Vinton National Bank*, 43 Ohio St. 346. In this latter case *McIlvaine*, C.J., says: "And again, the difference between the bankrupt law, which absolves the bankrupt from all future liability on debts provable against his estate, and our insolvent laws, might possibly require different conclusions in respect to the effect to be given to notice served on the assignee."

The following was held a sufficient notice to husband and wife through husband as agent for wife: "I beg to advise you that T. C. L.'s note for \$3,500 in your favour, and indorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand:" *Counsell v. Livingston*, 21 Occ. N. 563, 2 O. L. R. 582; 22 Occ. N. 360, 4 O. L. R. 340.

Partners are agents for each other, and therefore notice to one is notice to the firm of the firm's bill or note. Where the notice is not mailed to the firm under s.-s. 4, it is well to leave the notice at the place of business of the firm and not deliver it in the street to a member of the firm. After a dissolution of the firm each member should have notice.

Where there are two or more indorsers or drawers, not partners, each must have notice unless one of them has authority to receive for the other.

In *Balloch v. Binney*, 2 Kerr N. B. 440, where the bill was dated at Moncton; Gray, counsel, argued: "The bill is dated at Moncton; therefore a notice addressed to the defendant at that place is sufficient, because the inference is that he lives there. In *Mann v. Moors*, Ry. & M. 249, the bill was dated Manchester; and *Abbott*, C.J., held that a notice of dishonour put into the post office addressed to Mr. Moors,

Manchester, was sufficient. For the sake of convenience, it ought to be inferred that the drawer resides where the bill is dated; at all events in such case very slight evidence is sufficient." The Court, through Chipman, C.J., did not accede to this argument, and thought Moncton not definite enough, that it might mean a large parish, etc., therefore evidence should have been given as to where Moncton was and the course of the post.

In 1874 the Dominion Parliament passed an Act, which was afterwards embodied in R. S. C. c. 123, s. 5, by which it was provided that a notice of dishonour was sufficiently given, if addressed in due time, to any party to such bill or note entitled to such notice, at the place at which such bill or note was dated, unless any such party had under his signature designated another place, and that such notice should be sufficient notwithstanding it was not the true address of the party.

In *Cosgrave v. Boyle*, 6 S. C. R. 165, the Act of 1874, R. S. C. c. 123, s. 5, came up for discussion. The note was dated at Toronto, 5th November, 1878, payable four months after date, and fell due 8th March, 1879. On this latter day it was protested by the notary and notices mailed to M. P., the maker, at Toronto, J. S., indorser, Toronto, and Messrs. Cosgrave, indorser, Toronto. J. S. died 5th December, 1878, one month after the note was made and three before it fell due. J. S. did not designate any address under his signature on the note; his address was Lansing. Neither the holders nor notary knew of his death when the note matured. Counsel contended that the statute did not displace the rules of the common law. Ritchie, C.J., said: "I think the holder bank fulfilled its duty when it sent the notice to the place at which the note was dated. . . . The statute was passed, in my opinion, to relieve holders from the difficulties and risks so likely to arise from the necessity of observing the very strict technical rules in regard to notices of dishonour, and, instead of requiring such notices of dishonour to be sent to the residence or place of business of drawers and indorsers . . . and imposing on holders the burthen of discovering the proper address to which notices should be sent, substituted, in lieu of the implied contract in respect thereto, a

statutory contract by which the holder was relieved from all difficulty and risk, by enacting that all notices should be sufficient, if addressed in due time to the party upon whom liability was to be fixed, at the place at which the note was dated, unless another place is designated." He further said that he thought the representative had the same right as his testator, and no other or greater right. Strong, J., said: "But it appears plain on principle that if the right of action is once fixed and absolute in the holder, a subsequent indorser taking up the paper is subrogated to his rights." Gwynne, J., said: "And the notice having been good and sufficient notice given by the holders at maturity to the payee, enures to the benefit of the plaintiff, notwithstanding that he was aware of the decease of the payee; a contrary decision would defeat what I cannot but take to have been the object of the statute, namely, to relieve holders of overdue notes and bills from all anxiety and difficulty arising by reason of their being ignorant of the actual place of residence of the parties on the note or bill, or of the fact appearing here, namely, the decease of the party to whom notice was addressed."

The Bills of Exchange Act, s. 49, s.-s. 4: "Notice of the protest or dishonour of any bill payable in Canada shall, notwithstanding anything in this section contained, be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place; and in such latter case such notice shall be sufficiently given if addressed to him in due time at such other place; and such notice so addressed shall be sufficient, although the place of residence of such party is other than either of such above mentioned places; and such notice shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, *at any time during the day* on which such protest or presentment has been made, or *on the next following* juridical or business day; such notice shall not be invalid by reason of the fact that the party to whom it is addressed is dead."

It will be noticed that the Legislature adopted the law as laid down in *Cosgrave v. Boyle*.

Now, what is necessary to be done under the Act in case of the death of a party entitled to notice? Section 49 (i) : Where the drawer or indorser is dead, and the party giving notice is aware of it, the notice must be given to his personal representative, if such there is and with reasonable diligence he can be found.

As a fact, there could be no better way of a notice reaching a deceased party than to simply address the same to him in the mail, for his personal representative would be entitled to receive his letters.

Under the foregoing sections the notice should be addressed as under s. 4 to the party, and if the holder giving such notice knows he is dead, the notice may be addressed to his personal representative, if with the exercise of reasonable diligence he can be found, if not, then to deceased, and, if no address is designated on the bill or note, at the place where the note is dated.

When is it to be given? By s. 49 (k), as soon as the bill is dishonoured, and not later than the next following juridical or business day. Therefore, if the day following the dishonour is a holiday, the holder has the next day after the holiday to give the notice.

It would seem that the old rule of being bound to catch the first mail leaving on the day following the day of dishonour does not now apply, and that the notice may be given or mailed at any time on the following day.

In Nova Scotia, a County Court Judge held that where the parties reside in the same place, the plaintiff must shew that there was a delivery after the notice was mailed. I cannot see where the Act makes any such requirement.

Again, suppose the bill or note is dated at "London," "Liverpool," or other place where there is another place of the same name in America. I would think that, if the bill or note bears any indication of what place is intended, such as the bill stamp or bank stamp, etc., the party sending the notice would be justified in adding "England," etc., or as the case might be. This would only be common sense. It is true that it was decided in New Brunswick that the bank stamp on the note was not an indication that the bill or note was in

that bank when it fell due, so as to do away with the necessity of proving presentment, the note being payable at that bank: *Cole v. McDonald*, 34 C. L. J. 174.

The provisions of s. 49, s.-s. 4 (not in the English Act), do away with a large amount of the particularity required by the old law as to personal service of the notice; still in some cases it may be required to be resorted to; in such case s.-s. (h) of s. 49 has to be referred to. It may be served personally or left with an agent, or at the party's place of business. If no place of business, then at dwelling house with the party or some adult person in charge. If no place of business or dwelling house, then at last known place of abode.

It has been held that a notice delivered to a man cutting wood in the yard: *Commercial Bank v. Weller*, 5 U. C. R. 543: oral notice to solicitor of indorser: *Crosse v. Smith*, 1 M. & S. 554: are both insufficient. Notice to clerk in merchant indorser's office: *Allen v. Edmundson*, 2 Ex. 724: fellow boarder in boarding house of indorser during his absence: *Bank of U. S. v. Hatch*, 6 Pet. U. S. 250: are both good.

Where a party to a bill receives due notice, he has the whole of the following day after receipt of same to send notice to any party to the bill he wishes to hold: see s. 49, s.-s. 3. The different branches of a bank have the privileges of this sub-section. The miscarriage of the post will not affect the validity of a notice if it is right in other respects: s.-s. 5.

Delay in giving notice is excused when it is caused by circumstances beyond the control of the party giving the same, and not imputable to his default, misconduct, or negligence: s. 50. When the cause of delay ceases to operate, the notice must be sent with reasonable diligence. The giving of notice may be prevented by state of war: *Patience v. Townley*, 2 Sm. 223; *Bond v. Moor*, 93 U. S. 593; *Rouquette v. Overmann*, L. R. 10 Q. B. 523. Epidemic: *Windham Bank v. Norton*, 22 Conn. 213; *Tunno v. Lague*, 2 Johns. N. Y. 1. Death or sudden illness of the holder or his agent: *Rothschild v. Currie*, 1 Q. B. 17; *White v. Stoddard*, 11 Gray (Mass.) 258.

Where an indorser could not be found when the bill was dishonoured, and some time afterwards a writ was issued and served on him without any previous notice, it was held that

he was released on account of not being notified when his address became known: *Studdy v. Beesty*, 60 L. T. N. S. 647, W. N. (1889), 14. This case could hardly arise in Canada, for the holder could simply act under s.-s. 4 of s. 49, and that would fix the liability: see *Cosgrave v. Boyle*, *supra*.

Notice may be expressly or impliedly waived either before the time for giving has arrived, as by writing on the bill or note, or expressing it in a separate document, for instance, "presentment and notice of dishonour waived," or after the omission to give, as by taking a new note or promising to pay with a knowledge of the omission. A waiver enures for the benefit of all parties to the bill: *Raby v. Gilbert*, 30 L. J. Ex. 170.

There is no waiver if the party promising has no knowledge of the omission: *Dana v. Bradley*, 5 Allen N. B. 292. It would seem that if a new note is given without knowledge of the laches of the holder it is a waiver of want of presentment of the old note, and the objection of want of consideration could not be set up against the new note afterwards: *ib*.

Excuses as regards the drawer.—Where the drawer and drawee are the same person, or a fictitious person, or a person not having capacity to contract. Where the drawer is the person to whom the bill is presented for payment. Where the drawee or acceptor is as between himself and the drawer under no obligation to pay the bill. Where the drawer has countermanded payment. In these cases no notice is necessary. But there is no excuse in the fact that the acceptor or maker has said, before the bill or note is due, that he will not pay it.

Excuses as regards the indorser.—Where the drawee is a fictitious person, or one not having capacity to contract and the indorser is aware of it when he indorses the bill. Where the indorser is the person to whom the bill is presented for payment and where the bill was accepted or made for his accommodation: s. 50 (d).

The acceptor of a bill and maker of a note are liable without notice. A guarantor not on the bill is likewise not entitled to notice.



Secondary evidence of a notice of dishonour is admissible without a notice to produce: Roscoe N. P., p. 375.

In the case of a foreign bill, a notarial copy of the protest and of the notice of dishonour and a notarial certificate of the service of such notice, shall be received as *prima facie* evidence of such protest, notice, and service: s. 71 (f). In the case of an inland bill or note, a protest of any bill or note, and any copy thereof as copied by the notary or justice of the peace, shall in any action be *prima facie* evidence of presentation and dishonour, and also of service of notice of such presentation and dishonour as stated in such protest: s. 93, s.-s. 5.

It will be noticed that the terms of the two sub-sections are different. Section 71, s.-s. (f), in the case of a foreign bill, seems to contemplate a copy of the notice of dishonour being attached; and s. 93, s.-s. 5, in the case of an inland bill or note, simply says that copy of protest shall be *prima facie* evidence of service of notice as stated in the protest, and nothing about a copy of the notice of dishonour.

It has been decided in the United States that notice, after the dissolution of a firm, may be made to one partner for all provided the holder has no notice of the dissolution: *Bliss v. Nichols*, 12 Allen (Mass.) 443: and that the notice is good in any case in *Hubbard v. Matthews*, 54 N. Y. 43, and other cases. This latter rule has been adopted in the United States Negotiable Instruments Law as follows:—"Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution." See American Negotiable Instruments Law, s. 170.

EDMUND G. KAYE.

St. John, N.B., 12th May, 1902.

## COPYRIGHT.

The author of an admirable work just published on the law of British Copyright declares in his preface that his book had its origin in his "endeavours to understand what is perhaps the most complicated and obscure series of statutes in the statute book."\*

"It is now," he adds, "28 years since the Royal Commission on Copyright was appointed, and still nothing has been done to ameliorate the lamentable condition in which the commissioners then found the law. Dissensions among those interested in copyright, failure to come to a satisfactory arrangement with the colonies, and want of time at the disposal of the Legislature, are mainly responsible for this delay."

If the law of copyright in Great Britain is "complicated and obscure," it is doubly so in Canada, where, in addition to the "lamentable" British law, we have in full force an independent system of our own, and where in addition to the law of copyright proper, we have a constitutional difficulty which has remained unsolved for more than half a century, and which for its understanding requires an intimate knowledge of a heterogeneous mass of treaties, conventions, statutes, orders in council, proclamations, official correspondence, and parliamentary discussions, besides the doings of select commissions, copyright associations, societies of authors, boards of trade, and what not.

But if the constitutional struggle between the Canadian and the British Government has been a lengthy and intricate one, the question at issue is simple enough. It is, in a word, the British book trade against Canadian self-government. The influence of the British publishers in Imperial councils has in the past been potent and persistent enough to prevent the Imperial Government for a period of more than 60 years from conceding to Canada that self-government in copyright that has been freely admitted to be our constitutional right in every other subject enumerated in the 91st section of the

\*The Law of Copyright: Macgillivray.

British North America Act. That the British publishers have abated nothing of their attitude or of their strength is evident from the recently reported declaration of the Colonial Secretary that, strong as the present British Government is, it is doubtful if it could carry through Parliament a measure declaratory of colonial self-government in the matter of copyright.

On the other hand, the Canadian Parliament, having set its face in the direction of Canadian control of Canadian affairs, evinces no inclination to look over its shoulder. One of the last State papers penned by the late Sir John Thompson was on the subject of the copyright controversy. It is evident from the tone of the paper that he had reached the conclusion that the time had come for dropping diplomatic niceties and calling things by their right names. In the course of his argument he declared that the persistency of the Imperial Government in its denial to the self-governing colonies of control over copyright might be regarded as a continuance for the benefit of the British authors and publishers of the system which was based on "the idea that the colonies were to be preserved only for the benefit of the producers in the British Islands, and that the inhabitants of these colonies had no rights of self-government or otherwise which were inconsistent with the interest of the British producers."

In introducing the Canadian Copyright Amendment Act of 1900 into the House of Commons, the present Minister of Agriculture declared, that "there is not a single man in Canada who is prepared for a moment to question or doubt our constitutional right to legislate upon copyright questions." More recently, it has been announced that a suggestion by the British Colonial Secretary to the Canadian Minister of Justice that the latter should prepare a Copyright Bill and submit it to the approval of the British Government was politely but firmly declined. In short, there has never been any division on party lines, or indeed any division of opinion whatever in the Parliament of Canada on the subject. The Canadian Government has taken the position that the principle of self-government being questioned, that matter must be settled as a preliminary to the discussion of details.

The Canadian publishing interests will probably not be in entire harmony as to what the copyright policy of Canada ought to be. They will, however, if they are true Canadians, all agree that, whatever that policy is to be, it must be "made in Canada." That it will be a fair and honest policy is to be expected; but if not, it is Canada's affair. The right to make laws carries with it the right to make mistakes. Canada has given no hostage to Great Britain to answer for the wisdom of her laws in the vastly more important matters of trade and finance, and the multitude of other matters with which the Dominion Parliament deals, without a suggestion of Imperial supervision. Why should copyright be upon a different basis?

#### IMPERIAL COPYRIGHT LEGISLATION.

The Imperial Act of 1842 was passed against the protests of the North American Colonies. The Act forbids the piracy of works entitled to copyright under its provisions, anywhere within the British Dominions. It also prohibits the importation into the British dominions of foreign reprints of British copyright books by any persons not being the proprietor of the copyright, and empowers the officers of the customs to seize and destroy such reprints. It further provides that the words "British dominions" shall be construed to mean "all the colonies." After the passage of the Act of 1842, Canada continued to protest until Earl Grey, then Colonial Secretary, intimated that in view of the remonstrances which had been received from the North American colonies, the Government proposed to leave to the Colonial Legislatures the duty and responsibility of making such laws as they might deem proper for securing the rights of authors. The actual relief granted by the Foreign Reprints Act of 1847 fell far short of Canada's claim and of Earl Grey's promise; but it was some recognition of the justice of the colonial position. The Act authorized her late Majesty, in case the Legislature of any British possession should be disposed to make due provision for securing the rights of British authors, and should pass an Act for that purpose, to approve of the same and to issue an order declaring that so long as such Act continued in force, the prohibition against the importation of foreign reprints should be suspended so far as regarded such colony.

The Canadian Government accepted the Act not as a finality but as a temporary measure, which though refusing recognition of the principle for which they contended, gave substantial relief from the intolerable commercial conditions against which they had also protested. A Canadian Act was accordingly passed, imposing a duty of  $12\frac{1}{2}$  per cent. on foreign reprints of British copyright works in order that the proceeds of such duty might be paid over to the owners of the British copyrights. In effect, to quote from a report prepared for the consideration of the Imperial authorities by Sir John Thompson, more than 50 years after the Foreign Reprints Act was passed, "the Imperial Parliament finding so great a grievance, obliged the holders of it to compound for a money consideration, which the colonists would pay without much expression of discontent, even if it involved denial to this country for a time of the rights of self-government."

#### THE BRITISH NORTH AMERICA ACT.

Under the head of "Distribution of the Legislative Powers of the Parliament," the British North America Act provides that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein enumerated." Then follows the enumeration of twenty-nine subjects, including "Copyright."

In 1872 the Parliament of Canada, in pursuance of its understanding of the "exclusive" jurisdiction conferred upon it by the Imperial Parliament, passed an Act respecting copyright. The Earl of Dufferin, then Governor-General of Canada, reserved the Act for the consideration of the Imperial authorities, and in due course Lord Carnarvon, in a despatch to the Governor-General, stated that he had been unable to advise Her Majesty to approve of the Act, because he said it was not contemplated by the British North America Act that the Parliament of Canada should have the power to interfere with the rights in Canada of the owners of copyright under the Imperial Copyright Act. In support of this view, he cited an opinion which had been procured by the British Copyright Association from two very eminent English lawyers to the effect that the word "exclusive" in the British North America Act "has reference only to the exclusive legislation

in Canada of the Dominion Legislature as distinguished from the provinces of which it is composed." Though Mr. Gladstone had declared in the course of the debate in the House of Commons which preceded the passing of the British North America Act, that "we have for a full quarter of a century acknowledged absolutely the rights of self-government in the colonies," this reversion of Downing Street in 1872 to its pre-Confederation attitude towards the colonies ought not perhaps to be a matter of much surprise, because the idea of self-government in the dominions beyond the sea was not as familiar thirty years ago in England as it is to-day. But making due allowance for the slowness with which new-fangled ideas percolate the British mind, the wonder, nevertheless, is that throughout the years that have intervened since Lord Carnarvon's despatch, with all their political development, the Colonial Office should still have clung stubbornly—one is tempted to say stupidly—to the 18th century idea of the rights of the home Government to legislate for the colonies.

The meaning of the phrase "the exclusive legislative authority of the Parliament of Canada," was judicially considered by Chief Justice Draper in the Ontario Court of Error and Appeal in 1875: *Regina v. Taylor*, 36 U. C. R. 183. His opinion, which, however, was not necessary to the decision of the case then before the Court, was that the words were "intended as a more definite renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of the Dominion."

The point, however, came up for consideration a couple of years later in the then newly constituted Ontario Court of Appeal, and the Court was unanimously of the contrary view: *Smiles v. Belford* (1877), 1 A. R. 436. In his considered opinion delivered in this case, Mr. Justice Burton said:

"It is clear, I think, that all that the Imperial Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the local Legislatures, and

placed them under the exclusive jurisdiction and control of the Dominion."

In the result, the Court held that it was not necessary for the author of a book, who had obtained copyright in England, under the Act of 1842, to obtain copyright under the Canadian Act before taking proceedings to restrain a Canadian reprint; in other words, that notwithstanding the British North America Act and the Canadian Copyright Act, the Imperial Act remained in full force in Canada, so far as Canadian reprints were concerned.

In delivering his opinion in this case, Mr. Justice Moss confessed that the conclusion at which he had arrived had not been reached without reluctance. He feared that the state of the law which the Court found to exist inflicted a hardship on the Canadian publisher, while it conferred no very valuable benefit on the British author. "Its effect," he went on, "if I rightly understand the matter, is to enable the British author to give an American publisher a Canadian copyright. It is no very violent assumption that every American publisher who treats with a British author for advance sheets of his work, will stipulate for the use of the author's name to restrain a Canadian reprint. By this arrangement he will be enabled to secure the practical monopoly of the Canadian market, for which he may be induced to pay the author some consideration; but, however small this consideration may be, I apprehend it will be found sufficient to induce the author to concede the privilege rather than secure Canadian copyright by treating with the Canadian publisher. But I need scarcely remark that the possible or probable effect upon a branch of industry, however valuable or important, cannot affect the interpretation which the Court is bound to place upon the statutes by which the subject is governed."

In 1875 the Canadian Parliament passed the present Canadian Copyright Act. To remove doubts as to its constitutionality, the Imperial Parliament passed an Act expressly empowering her late Majesty to assent to the Canadian Act. The effect of the Canadian Act is (1) to enable a British copyright holder to obtain copyright in Canada (and thus, while the Foreign Reprints Act was in force in Canada,

to exclude foreign reprints), and (2) to give an original Canadian copyright where the copyright is first applied for in Canada, in which case the Canadian copyright secures to the holder a monopoly to the territorial extent of Canada even as against British reproductions made under a subsequent British copyright: *Anglo-Canadian Co. v. Suckling* (1889), 17 O. R. 239. The rights of the holder of a Canadian copyright were materially enlarged by the Act passed by the Imperial Parliament in 1886, which provided that the British Copyright Acts should apply to books first produced in Canada or any other British possession in the same manner as they applied to a work first produced in the United Kingdom. Under this Act, if a book is copyrighted at Ottawa, a certificate of registration there is proof of copyright in all Courts throughout the British Empire.

In 1900 the Canadian Copyright Act was amended by what is commonly known as the Fisher Act, which empowers the Minister of Agriculture to prohibit the importation into Canada of British copyright works when Canadian copyright has been taken and a licensed Canadian edition has appeared here. This Act was assented to in due course, though if the interpretation placed upon the powers of the Parliament of Canada by the Imperial law officers be the correct one, it would appear to be beyond the jurisdiction of the Parliament of Canada.

#### THE INTERNATIONAL ASPECT.

The International Copyright Treaty, which is known as the Berne Convention, was signed in 1887. It applies to the British Empire, Belgium, France, Germany, Italy, Spain, Switzerland, Norway, Japan, and four or five smaller states. The effect of the convention is to give the authors of one country on obtaining copyright in their own country, all the protection that they would acquire by registering in all the countries included in the Copyright Union. Thus a book first produced in Canada and registered in Ottawa obtains by virtue of the British Copyright Act of 1886 and the Berne Convention, all the advantages of copyright throughout not only Canada, but the British dominions and the Copyright Union.



The United States was not a party to the Berne Convention, but in 1891 what is known as the Chace Bill was passed by Congress. The Chace Bill, in effect, provides that a citizen of a foreign country which permits citizens of the United States the benefit of copyright on the same terms as its own citizens, can obtain copyright in the United States. Upon representations by the Imperial Parliament to the Government of the United States "that the law of copyright in force in all British possessions permits the citizens of the United States of America the benefit of copyright on substantially the same basis as a British subject," the President of the United States issued his proclamation making the Chace law applicable to Great Britain and the British possessions. In consequence of the President's proclamation, Canadians, in common with other British subjects, are entitled to the benefits of copyright in the United States after registration at Ottawa.

The Canadian Copyright Act provides that any citizen of any country having an international copyright treaty with the United Kingdom, who is the author of a book, shall be entitled to copyright in this country. The Canadian law officers advised that this provision of the Canadian Act does not apply to citizens of the United States, on the ground that the Act of Congress and the President's proclamation do not constitute an "international copyright treaty." This has been criticized as a technical and illiberal interpretation, but it is obviously the only interpretation that a lawyer could place upon the statute. Any other interpretation would only lead to the granting of copyright which would inevitably be set aside by the Courts when called in question. The interpretation, moreover, does not work any practical hardship on American authors, because they can get British copyright by registering at Stationers' Hall, London, and thereafter, under the authorities as they stand, by printing and publishing in Canada they become entitled to copyright in this country.

#### OTTAWA VERSUS DOWNING STREET.

In 1889 the Parliament of Canada passed an Act amending the Copyright Act of 1875, by providing that if a person

entitled to copyright failed to take advantage of the provisions of the Act, any person domiciled in Canada might obtain a license from the Minister of Agriculture to print and publish, upon the licensee agreeing to pay the author a royalty. The Act was, however, reserved for the royal assent and was disallowed on the advice of the law officers of the Crown.

The disallowance by the Imperial Government of this Act reopened the controversy between Ottawa and Downing Street, and the word acrimonious is scarcely too strong to describe the correspondence that ensued. The Canadian representatives did not disguise their feeling of irritation at what they considered to be a narrow and illiberal construction on the part of the Imperial authorities of the rights of the Parliament of Canada. On the other hand, the representatives of the British publishing interests did not hesitate to impute to the Canadian Government indirect motives, or to use language in their communications to the Colonial Office that scarcely comported either with the importance or delicacy of the subject, or with the courtesy due to an opponent in an argument.

In his report on the subject, dated 3rd August, 1889, the Canadian Minister of Justice submitted that "as regards all those subjects in respect of which powers were given to the Canadian Parliament by the British North America Act, the true construction of the British North America Act is, that the Parliament may properly legislate without any limitation of its competency, excepting the limitation which her Majesty can always impose by disallowance (whether the Act be within the power of Parliament or not) and excepting also as to control by Imperial legislation subsequent to the British North America Act and applicable to Canada;" and that "if the 91st section of the British North America Act has not conferred on the Parliament of Canada all the power of the Parliament of the United Kingdom in respect to the subjects there enumerated, the gift of powers made by that Act is delusive, in respect to the Canadian Parliament, and is less than the gift of powers which the provincial legislatures previously enjoyed regarding the same subjects."

The following extracts from one of the numerous communications addressed by the British Copyright Association to the Colonial Office by way of answer to Sir John Thompson's representations will sufficiently indicate the tone of the argument on the other side:—

“She (Canada) has no wrong for which she can ask redress. Can she be serious in saying that Canada's commercial integrity is placed at the disposal of a privileged class? When Canada resorts to *veiled threats*, it is only kind not to notice them. . . . The ‘Canadian Press’ is not locked, but Canadians seem too indolent or ignorant of business to utilize it. In a State paper, the Premier of Canada actually talks of banishing British literature because he is unable to discriminate between honest, royalty-paid literature, and that which, we can prove, is smuggled in with the Government's connivance. Canada's conduct does not prove that the author's position would be bettered by the Act of 1899. . . . Australia is ahead of Canada in literature and authors because she fairly protects their property. It is not a case for Parliaments, but for the exercise of common honesty. . . . Either Canada has overlooked the interests of authors or cannot understand them. . . . The Act of 1875 indicates how Canada would use unrestrained liberty. . . . Statesmen understand what Canada is asking for, but cannot lend themselves to such barefaced injustice.”

After that one is not surprised to find a letter set forth at length in the blue book from the Secretary of the Copyright Association to the Colonial Office, in the course of which the writer gravely begs his Lordship to notice that “I have ventured to recommend the Canadian Government to *drop the subject*, because, in my opinion, no further legislation is required on their part, at least at present.” Even the italics are from the blue book.

#### THE LATEST PHASE.

In view of the persistence of the British Government in its policy of denial to Canada of full jurisdiction in copyright matters, the Canadian Government decided in 1894 to

discontinue the collection of the duty of  $12\frac{1}{2}$  per cent. which had theretofore been collected for the benefit of the British copyright holder, and the collection of that duty accordingly ceased on the 22nd day of July, 1895.

The effect of this action by the Dominion Government put the question back practically to where it had been in 1842, and there it remains to-day. Though the duty which was collected by the Canadian Government between 1847 and 1895 for the benefit of the Imperial copyright holders was, in the amount actually collected, a matter of no great hardship upon Canada, and though the discontinuance of the collection of the duty made the importation of foreign reprints illegal, under the law as it has been interpreted (*Morang v. Publishers' Syndicate* (1900), 32 O. R. 393), the Canadian Parliament preferred to accept the consequences of the situation which would result from its discontinuance, whatever they might be, rather than continue to be a party to an arrangement which, it was argued, was inferentially a recognition of the constitutional right of the Imperial Parliament to legislate for Canada on the subject.

In furtherance of the policy of the Canadian Government as indicated by the discontinuance of the collection of the copyright duty, the Canadian Parliament abstained in the Duties of Customs Act of 1897 from prohibiting the importation into Canada of foreign reprints of British copyright works, unless such works were also copyrighted in Canada. Everything may, of course, be imported the importation of which is not prohibited, and, as a matter of fact, the Canadian Customs officers have, since 1895, freely admitted British copyright works that are not also copyrighted in Canada, notwithstanding the prohibition against the importation into any of the colonies of such works contained in the Imperial Acts.

#### JUDICIAL AND CONSTITUTIONAL AUTHORITIES.

It is perhaps to be regretted that there has been no direct decision by the highest Court in the Empire on the subject of the controversy. The judgment of the Ontario Court of Appeal in *Smiles v. Belford* was undoubtedly an authority for the judgment of *Robertson, J.*, in *Morang v. Publishers'*

Syndicate, but a few years after the decision of *Smiles v. Belford* came the remarkable series of decisions by the Judicial Committee of the Privy Council dealing with the status of colonial legislatures, beginning with the familiar case of *Hodge v. The Queen*, 9 App. Cas. 117. In that case the Judicial Committee took a very wide view of the powers delegated by the British North America Act. The Court declared that "when the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for the provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances," etc.

In the Ontario Court of Appeal Mr. Justice Burton had in the same case used language very similar to that of their Lordships of the Judicial Committee above quoted. He declared that "it would seem a misapplication of terms to refer to the Provincial Legislature as exercising a delegated authority in the sense of being an agent or delegate of the Imperial Parliament. The Imperial Parliament has the power no doubt to pass laws such as those passed by the local legislature and affecting all her Majesty's subjects in the Province, but it is equally clear that it is a power existing in name only, and one which it would never attempt to exercise, and therefore the Parliament of the Province cannot in that sense be spoken of as exercising a delegated authority."

In the subsequent cases referred to—*Harris v. Davies*, 10 App. Cas. 279; *Powell v. Appollo Candle Co.*, 10 App. Cas. 282; *Riel v. The Queen*, 10 App. Cas. 675—the Judicial Committee took occasion to reiterate this view, and to call attention to the fact that their decisions had "put an end to a

doctrine which appeared at one time to have had some currency that a colonial legislature is a delegate of the Imperial Legislature." Is not that now exploded "doctrine" the foundation upon which the Court of Appeal built its argument in *Smiles v. Belford*?

The decisions of the Privy Council, though not directed to the subject of copyright, are of course as applicable to that subject as to any other of the twenty-nine subjects enumerated in the 91st section of the British North America Act. They are, moreover, in entire harmony with the views of the constitutional writers. It will be sufficient to cite an extract or two from Todd's Parliamentary Government in the British Colonies. Mr. Todd declares that the extension to Canada and Australia of the principle of local self-government set the seal upon all former concessions and enlarged the bounds of freedom and independence in the determination of all questions of local concern by establishing in those colonies institutions which were expressly designed to be "the very image and transcript" of the parent state.

As an illustration of the complete abandonment by the Imperial Government of control over colonial legislation, Mr. Todd cites the reply made in 1859 by Sir Alexander Galt, the Canadian Minister of Finance, to a despatch from the Colonial Secretary conveying the protest of certain Sheffield manufacturers against the then lately enacted Canadian tariff. Sir Alexander wrote, that he deemed it to be his duty "distinctly to affirm the right of the Canadian legislature to adjust the taxation of the people in the way they deemed best, even if it should unfortunately happen to meet the disapproval of the Imperial ministry. Her Majesty cannot be advised to disallow such acts unless her advisers are prepared to assume the administration of the affairs of the colony." "This position," he added, "must be maintained by every Canadian minister." The Imperial Government did not attempt to question the soundness of the position taken by Canada in 1859.

The attitude of the Imperial Government in the matter of copyright is in its constitutional aspect precisely as though it were to insist that British patents of invention should run

throughout Canada, or were to enact a tariff law for Canada, or were to impose direct taxation on the people of Canada. It will, of course, be freely conceded that the Imperial Parliament might as a matter of technical law, without the request or consent of Canada ("limitations of good faith and national honour not being considered") repeal the British North America Act, or impose direct taxation upon the people of this country, or an import duty on say tea, or an export duty on wheat or lumber. But Canadians have rights under the British constitution as well as Englishmen, and such laws while technically legal would, though enacted by the Imperial Parliament, beyond doubt, be unconstitutional: and if there were a British Court corresponding to the Supreme Court of the United States, they would, if enacted, be declared to be unconstitutional and void. In the absence of such a Court, the Imperial Parliament is, humanly speaking, and within the bounds of the British Empire, omnipotent. Not only so, but the Imperial Parliament of to-day cannot bind the Imperial Parliament of to-morrow. The question, therefore, whether the attitude of the Imperial Parliament on the subject of copyright in Canada is constitutional or not is in a sense a purely academic one. In other words, the attitude of the Imperial Parliament on a given subject may be unconstitutional, but, whatever it is, it is necessarily legal: and if it be clear that it is the intention of the Imperial Parliament that the Imperial copyright law shall extend to Canada, then the Courts must undoubtedly enforce the law as they find it. It is worth noting that the Privy Council cases above referred to do not appear to have been cited in the argument of *Morang v. Publishers' Syndicate*.

The mere circumstance that British governments have from time to time insisted upon a view inconsistent with the modern view of the legislative power of the self-governing colonies is of course in no way conclusive of the question. The government of the day has no authority to interpret the laws of Parliament.

Nor is it worth while arguing the question whether the existing British copyright law is a good or a bad law. The opinions of the latest writers on the subject, as we have

seen, is that the British law is in a "lamentable condition." But if it were a good law and well suited to Canada, the argument against it on its constitutional side would be just the same. It is not a question of detail as to the terms of the law; but of principle as to who shall make it. Perhaps the British Parliament could make a better tariff for Canada than our own Parliament. If any one is sanguine enough to believe that to be true, no one will, at all events, be foolish enough to suggest that Canada should relinquish to Great Britain her undoubted right to make her own tariff. Yet Canada's right to make her own tariff stands on no higher or different ground from her right to make her own copyright laws.

W. E. RANEY.

Toronto.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Injunction.]**—The Court of Appeal, while not disapproving, and one member expressly approving, the views, as to granting a mandatory injunction in cases of breach of covenant, expressed in *Bickmore v. Dimmer*, 18 T. L. R. 416, noted 22 C. L. T. 178, reversed the judgment on the ground that under the circumstances the erection of the clock in question was not an “alteration” of the demised premises, and therefore that no breach of the covenant against alteration had taken place.

**Insurance.]**—The policy of assurance in question in *In re Browne's Policy*, 19 T. L. R. 98, effected by a married man, was expressed to be “for the benefit of his wife and children.” The wife living at this time having died, the assured married again, and at his death left him surviving the second wife and children by both marriages. Section 11 of the Married Women's Property Act, 1882, provides that “a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, shall create a trust in favour of the objects therein named.” It was held that the policy should be construed as intending to make provision for all persons of the designated classes existing at the time of the assured's death, and therefore that the second wife and all the children took under it. The provisions of the Ontario Insurance Act, R. S. O. 1897 c. 203, s. 159, though more elaborate, are in many respects similar to those of the Imperial Act, and this case should be compared with *Mearns v. Ancient Order of United Workmen*, 22 O. R. 34, where under a policy by a widower payable to his “legal heirs,” it was held that the second wife, who survived him, took nothing; and *In re Eaton*, 23 O. R. 593, where the second wife also failed in her claim to share, the Christian name of

\*Including the cases in No. 7, Vol. 19, to 16th January, 1903.

the first wife being mentioned in the policy; *Crosby v. Ball*, 4 O. L. R. 496, where the insertion of the name before the words "his wife," was held sufficient to give the fund to a woman with whom the assured had gone through the ceremony of marriage while his supposedly dead wife was living; and *Re Snyder*, 4 O. L. R. 320, where infant children were held to take to the exclusion of adult children—are recent cases to be noted in this connection.

**Interest.]**—The Court of Appeal in *In re Lloyd, Lloyd v. Lloyd*, 19 T. L. R. 101, decided, after an elaborate review of the authorities, that where land, an interest in which had been mortgaged, had been sold in an administration action and the proceeds paid into Court, the representatives of the mortgagor, upon a summons by them for payment out, were entitled to receive only the balance after providing for the full claim of the mortgagee, including more than six years' arrears of interest. While the decision is, having regard to the facts, to some extent a special one, the reasoning is general, and the Court clearly express the opinion that in an action against him for redemption a mortgagee is entitled to more than six years' arrears of interest, a view contrary to that expressed by the Court of Appeal for Ontario in the earlier case of *McMicking v. Gibbons*, 24 A. R. 586, where *Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, in which more than six years' arrears were allowed, was disapproved.

**Lunatic.]**—It being the law that a father is not under legal obligation to provide for his children, it was held, in *Healing v. Healing*, 19 T. L. R. 90, to follow that a sum expended by the brother of a lunatic (not so found) for the maintenance of the lunatic's children could not be set off by the brother against an amount due by him to the lunatic. The rule, as was decided in *Read v. Legard*, 6 Exch. 636, is different in the case of a lunatic's wife, the legal obligation to provide necessaries existing there.

## EDITORIAL REVIEW.

**The Chief Justice of the North-West Territories.**

We note the recent retirement of Mr. Thomas H. McGuire, Chief Justice of the Supreme Court of the North-West Territories, and the appointment of Mr. A. L. Sifton, who was a member of the Executive Council of the Territories, as his successor. Mr. McGuire was a conscientious and industrious Judge, and his considered opinions, many of which have been published in these columns, indicate learning and considerable originality. The new Chief Justice, like most barristers who have been in politics, is "no great lawyer," if popular opinion is to be trusted. He is, however, a young man, he knows the circumstances of the Territories and the ways of its people, and it is conceded that he is clever. It is not unlikely that he will confound his critics by turning out an excellent Judge. Were it not for partyism, we might hope to see judicial positions filled by men who possessed all the advantages and good qualities of the new Chief Justice, and who are lawyers as well. There are such men.

**Death of Judge McDougall.**

The sad news of the sudden death of Mr. Joseph Easton McDougall, K.C., Judge of the County Court of York, Ontario, and Local Judge in Admiralty, was received too late for lengthy comment upon his life and work. The Bar and the public will be united in regret at the untimely close of a career of great usefulness. Mr. McDougall was an admirable Judge and in every way an excellent public servant. His place in the community will be a difficult one to fill satisfactorily.

**The Hamilton Law Association.**

The trustees' annual report for 1902 (23rd year) shows *inter alia* that the number of members of the association is 70; that the number of bound volumes in the library, exclusive of sessional papers, etc., is 3,875, of which 109 were

added during the year; that twelve periodicals are received; and that the library is kept insured to the amount of \$8,000.

The report also contains the following: In the past year the association sustained a great loss by the death of Mr. Warren F. Burton, one of the original members, who had for twelve years held the office of treasurer, and by his enterprise and energy did much to promote the welfare of the association.

At a special meeting of the trustees Mr. J. A. Culham was elected to succeed the late Mr. Burton as treasurer, and subsequently Mr. S. F. Washington, K.C., was appointed to fill the vacancy on the trustee board.

The association also records with regret the death of Mr. T. A. Wardell, M.P.P.

By the death of Mr. S. H. Ghent, deputy registrar of the High Court and clerk of the County Court of the county of Wentworth, the county has lost a most competent and pains-taking officer; the trustees have chronicled the same with deep regret.

The vacancy caused by the death of Mr. Ghent has been filled by the appointment of Mr. T. H. A. Begue, one of the original members of the association.

On the 25th March a testimonial was presented to Mr. T. B. Martin by members of the Bar and others of his friends, on the occasion of his departure from Hamilton; the presentation was made by Mr. Justice MacMahon.

On the 4th April, 1902, the members of the Association met in the library to receive the Minister of Justice, the Hon. Charles Fitzpatrick, K.C.; the president gave an address of welcome to which the Minister of Justice replied.

The officers for 1903 are as follows:—President, Mr. Edward Martin, K.C.; Vice-President, Mr. F. MacKelcan, K.C.; Treasurer, Mr. J. A. Culham; Secretary, Mr. W. T. Evans.

Trustees:—Mr. S. F. Lazier, K.C., Mr. G. Lynch-Staunton, K.C., Mr. William Bell, Mr. P. D. Crerar, K.C., Mr. S. F. Washington, K.C.

Auditors:—Mr. Charles Lemon, Mr. W. A. Logie.

**Bees and Negligence.**

A curious example of the principle established in *Rylands v. Fletcher*, 19 L. T. Rep. 220, L. R. 3 H. L. 330, is to be found in the recent decision of the King's Bench Division (Ireland) in *O'Gorman v. O'Gorman*. The defendant had kept twenty-two hives of bees on his land, which adjoined the plaintiff's father's lands. While the plaintiff was harnessing a horse in front of his father's house a swarm of bees alighted on him and the horse. The horse bolted, and the plaintiff, becoming entangled in the reins, was crushed against a wall and severely injured. The defendant immediately before the accident had taken honey from the hive, having protected himself with a crape veil and covering. The jury found that the injuries complained of were caused by the bees having stung the horse; that they were kept on the defendant's lands in an unreasonable number, at an unreasonable place, and with appreciable danger to the persons on the adjoining farm; that the defendant knew that bees were dangerous and accustomed to sting mankind; that the honey was not taken from the hive with reasonable care; and that the defendant had been guilty of negligence. All the members of the King's Bench Division thought that the question of scienter was out of the case, but they upheld the judgment that had been entered for the plaintiff—Mr. Justice Kenny and Mr. Justice Wright doing so on the ground that there was evidence to support the finding of the jury that the bees were kept on the land to an unreasonable extent, and Mr. Justice Barton because he considered that there was evidence of negligence on the defendant's part.—(*The Law Times*.)

**An Extraordinary Murder Case.**

A pair of girls, aged respectively twenty and seventeen, do not often attain to the dignity of murder. When they do, society is rather awkwardly posed with the question, how to dispose of them? At Liverpool, Ethel Rollinson, aged 20, and Eva Eastwood, aged 17, were sentenced to be hanged for the murder—a particularly callous one—of their elderly mistress, whom they had smothered with pillows. But that the

facts were proved, the case would have read like a gross burlesque from the pen of a Swift in his dotage. The two young murderers were found by a fellow-servant, whose sense of propriety seems not to have been much upset, "trying on the hats and clothes of the elderly Miss Marsden," who lay dead under the pillows with which they had stifled her. Here is a depth of the non-moral grotesque which fiction, old or new, has not ventured to sound. It will be called savage, but it is not savage in the least. Among savages these sporadic jests of crime are quite unknown. They impeach our modern social organization, and this is why we are puzzled to know what kind of punishment to mete out to them.—(*The Law Times*.)

#### **Uncertainties of the Law.**

A subscriber sends us the following, from the *Dublin Freeman*:—

The law's uncertainties are sometimes curiously exemplified. The County Court Judge of Donegal, his Honour Judge Webb, in a recent case of ejectment on title, in which the question was whether an equitable title was now sufficient to sustain such a proceeding, delivered himself as follows: "Before the Judicature Act an equitable title was not sufficient to sustain an ejectment on title in the Superior Courts. In the Civil Bill Courts no such fusion has been effected, and accordingly I have always been of opinion that in my court ejectment on the title should be governed by the former law. Unfortunately, I have acted upon that opinion, and have been reversed, and, acting on the opinion of the Judge who reversed me. I have again been reversed by his successor. In a recent case, however, I was reversed by Lord Justice Holmes on the express ground that the title of the plaintiff was equitable only, and, in my opinion, I was very properly reversed. Accordingly, I act on the authority of the Lord Justice and dismiss the ejectment before me without prejudice." The Judge, no doubt, found himself in rather a perplexing situation, but that perplexity must be considerably increased by the fact that the Lord Chief Baron has since reversed the decision of the learned Judge, and has given a decree for the possession!"

**Recent American Decisions.**

*Carriers.*—One who enters and rides upon a train which he knows, or by the exercise of reasonable diligence could know, is prohibited from carrying passengers, is held, in *Purple v. Union Pacific R. Co.* (C. C. A. 8th C.), 57 L. R. A. 700, to be a trespasser and not a passenger, and the only duty of the railway company toward him is held to be to abstain from wanton or reckless injury to him.

A passenger who leaves his car of his own volition for some purpose of his own not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, is held, in *Chicago R. I. & P. Co. v. Sattler* (Neb.), 57 L. R. A. 890, not to be entitled to the protection of a statute making a carrier liable for all personal damage inflicted on a passenger being transported over its road.

*Criminal Law.*—One accused of a capital offence is held, in *Re Ascher* (Mich.), 57 L. R. A. 806, not to have been in jeopardy so as to bar a subsequent trial, where, after the jury had been impanelled and the trial begun, the Judge discharged them after ascertaining, by independent investigation, that some of them were so prejudiced in favour of the accused as to be incompetent, and had endeavoured to prejudice other jurors, belittled the State's evidence, procured the intoxication of the bailiff, and obtained communication with persons not jurors.

*Damages.*—In assessing the damages against carriers for breach of their contract to transport a corpse, it is held, in *Louisville and N. R. Co. v. Hull* (Ky.), 57 L. R. A. 771, that mental suffering may be considered.

*Evidence.*—The admission of testimony of physicians appointed by the Court to examine plaintiff in an action for injuries due to negligence, as to the result of an examination made after defendant's motion for such examination was withdrawn, is held, in *South Covington & C. Street R. W. Co. v. Stroh* (Ky.), 57 L. R. A. 875, to be erroneous. The power of the Court to call and examine witnesses is discussed in a note to this case.

*Execution.*—A bicycle used by a painter, paper-hanger, and bill-poster to earn a livelihood is held, in *Roberts v. Parker* (Ia.), 57 L. R. A. 764, to be within the provisions of a statute exempting from execution the team of a labourer who is the head of a family, and the waggon or other vehicle, by the use of which he earns his living, although the bicycle was not known when the statute was enacted.

*Forgery.*—To add to a cancelled cheque the words "in full of account to date," with intent to alter its effect as a receipt, is held, in *Gordon v. Com.* (Va.), 57 L. R. A. 744, to constitute forgery.

*Husband and Wife.*—Although the beginning of a cohabitation was meretricious, each of the parties having a lawful spouse then living, it is held, in *University of Michigan v. McGuckin* (Neb.), 57 L. R. A. 917, that there is sufficient evidence of a lawful marriage where, after the obstacles thereto were removed by decree of divorce, the parties continued for a long term of years to live together as husband and wife and continuously represented themselves to the public as such, and five children were born of the union, whom the parents unitedly represented to the public and caused to be baptized into the church as the children of lawful wedlock.

*Infant.*—Negligence of an infant in performance of his contract to thresh grain which results in the destruction of the grain and the shed covering it by fire set by sparks from the engine is held, in *Lowery v. Cate* (Tenn.), 57 L. R. A. 673, not to render him liable for the loss. With this case is a note, reviewing the authorities on liability of an infant for torts.

A boy six years old, knowing that hot water will burn, is held, in *Brinkley Car Works Mfg. Co. v. Cooper* (Ark.), 57 L. R. A. 724, to have no right to recover damages for injuries received from voluntarily or carelessly walking into a pool of it, formed by emptying a boiler on premises upon which he is trespassing.

*Insurance.*—Insurer who receives an assignment of the mortgagee's claims against the mortgagor upon paying him



the amount due under the policy on mortgaged property, is held, in *New Hampshire Fire Ins. Co. v. National Life Ins. Co.* (C. C. A. 8th C.), 57 L. R. A. 692, to have no right in an accounting of all sums received from the various policies on the property by the mortgagee, who is seeking to enforce his mortgage for an unpaid balance, to insist that he should be charged with the portion of the sum received under another policy which he is charged to have wrongfully permitted to go to the mortgagor, where the amount kept by him out of such payment was more than the share of the mortgage indebtedness chargeable to that policy.

A clause in a policy of fire insurance requiring the assured to keep the books and inventories of his business securely locked in a fire-proof safe at night and at all times when the building is not actually open for business, is held in *Phoenix Ins. Co. v. Schwartz* (Ga.), 57 L. R. A. 752, not to apply to a suspension of business caused by a fire raging in the vicinity and threatening the consumption of the building, the same not being actually shut up and business operations being interrupted because of the threatened danger.

Insurance against loss through liability for personal injuries is held, in *Bain v. Atkins* (Mass.), 57 L. R. A. 791, not to constitute a trust fund for the benefit of the injured person, and he is held to have no right to maintain an action against the insurers to reach such fund, where, before his claim against the insured is established, the insurers satisfy their obligation to him under the policy, although, by reason of the insolvency of the insured, the claim will be otherwise unenforceable.

*Master and Servant.*—A railway company running their trains over another road by permission are held, in *Brady v. Chicago & G. W. R. Co.* (C. C. A. 8th C.), 57 L. R. A. 712, to be liable to their employees for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master, but not to be liable for their negligence in discharge of their duties as servants.

A servant having authority to direct and control others is held, in *Southern Pacific Co. v. Schoer* (C. C. A. 8th C.),

57 L. R. A. 707, to be a vice-principal of the master, for whose negligence the master is liable, although he is not engaged in performing the absolute duties of the master when he commits a negligent act causing injury to one under his control and is not actually engaged in exercising his power of superintendence over the injured servant, under a statute making all servants who have authority to direct and superintend other servants vice-principals of the master.

Using a switch engine without a handhold on the tender is held, in *Coley v. North Carolina R. Co.* (N. C.), 57 L. R. A. 817, not to constitute an assumption of the risk of such defect by the employee, where the statute makes railway companies liable for injuries to employees from "any defect in the machinery, ways, or appliances," and makes void any agreement to waive the benefit of the statute. With this case is a note collating the other authorities on statutory liability of employers for defects in the condition of their plant.

*Telegraph Company.*—Substantial damages are held, in *Western Union Telegraph Co. v. Church* (Neb.), 57 L. R. A. 905, to be recoverable for breach of a contract to transmit promptly a telegram which the company knew to be addressed to a physician, directing him to come to the sender's house at once.

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## CORRESPONDENCE.

**The Mechanics' Lien Act in Unorganized Districts.**

*Editor* CANADIAN LAW TIMES.

Sir,—Great inconvenience and needless expense is caused in the unorganized districts by the provision of this Act which requires liens created by the Act to be realized (if realized at all by aid of legal proceedings) through the High Court. See s. 31, and Holmsted on that section. Many claims are for amounts which, in other matters, would be within the jurisdiction of the Division Court, and might just as well be filed with the Division Court clerk in one of the 10 or 12 offices in each district; instead of which the suitor is confined to one office,—that of the High Court in the district town (corresponding to the county town in counties),—which is many miles distant from the majority of residents, and possible lien-holders, in any of the unorganized districts, such as Algoma, Nipissing, Parry Sound, Muskoka, and others. Besides this, the pleadings as required by the High Court practice are altogether too cumbrous and expensive for small claims of wage-earners who frequently become entitled to liens under the Act.

The principle of the Act has been accepted by the public now for some years, and it may be looked upon as part of our permanent statute law. Why, therefore, should the machinery for carrying it into effect be left year after year in an imperfect state? Will some legislator with practical legal knowledge take the matter up at next session, and introduce the necessary amendments?

SOLICITOR.

January, 1903.

## BOOK NOTICE.

**Fraser's Law of Torts.**—A Compendium of the Law of Torts Specially adapted for the Use of Students, by Hugh Fraser, M.A. LL.D., of the Inner Temple and Northern Circuit, Barrister-at-law, Reader in Common Law to the Council of Legal Education, Author of "Principles and Practice of the Law of Libel and Slander." Fifth edition. London: Sweet and Maxwell, Limited: 1902.

A new edition of a very useful work.

# THE CANADIAN LAW TIMES.

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MARCH, 1908.

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## THE CIVIL CODE OF THE PROVINCE OF QUEBEC.

THE vast territory of the new world seems to have been regarded by the Kings of France as a hunting ground and trade reserve.

Trading companies, of which the most important and best known is that of the Hundred Associates or the Company of New France, created by Richelieu in 1627, practically exploited the country for their own private gain, with no regard to the advancement either of country or people, or to the fulfilment of the obligations entered into with the King on their formation. (See Lemieux, p. 256, etc.)

They had indeed no interest in the colonization of Canada, and would have gladly excluded all but their own employees, so that their lucrative trade in furs might not be interfered with.

The first attempt at the systematic administration of justice was made under the Company of New France, in 1651, when a grand seneschal, or Chief Justice, was appointed for the whole country; his court and jurisdiction lasted until the constitution of the Sovereign Council in 1663. (Old Regime, 3 Rev. Leg. 74.)

The Coutume of Paris was the law invoked and professedly observed during this period, though, in truth, every Governor was to a great extent a law unto himself, and the justice administered varied to a great extent according to the length of his feet.

In 1663 the King resumed the sovereignty of New France, the "Company of the Hundred Associates," which had been in control since 1627, having voluntarily resigned the country to him.

As a first step towards improving the condition of the colony, he provided for the administration of justice, and established at Quebec a "Sovereign Council," "*pour y faire fleurir les lois, maintenir et appuyer les bons, châtier les méchants, et contenir chacun dans son devoir.*" (Lareau *Histoire du Droit Canadien*, I., p. 107.)

From the establishment of this "Sovereign Council" dates the existence of organized civil government in New France. (Lemieux, p. 268.)

This council was not only the highest court of justice in the colony, but was to be consulted in all public matters of importance. (Lemieux, p. 263.)

Its functions were to judge "*toutes matières civiles et criminelles conformément à nos edits et ordonnances et à la Coutume de notre bonne ville de Paris.*" (Lareau, p. 112.)

What was the law which was to guide this tribunal in its judicial work?

For the answer to this question we must look at the position in Old France.

Before the Code Napoleon was enacted, France was divided into "Written law districts" (*pays de droit écrit*) and "Customary law districts" (*pays de coutumes*).

In the first division were embraced all those provinces which had adopted the Roman law; the other provinces were regulated by the customs (*coutumes*), the customary laws, as some writers suppose, of the barbarian invaders from the north, who had settled in France.

There were 360 Customs, of which sixty were general and three hundred were local.

The customary laws were limited in their application to particular districts, and were so numerous that Voltaire declared that in travelling through France one changed the laws as often as one changed horses. This was no doubt an exaggeration.

The principal ones were those of Paris, of Orleans, and of Normandy.

A large number of these customary laws were reduced to writing. Everywhere, however, the Roman law was considered as the common law, but in the districts where customary law prevailed, recourse was had to the Roman law only when cases arose which were not provided for in the Coutumes (1 Rev. Leg. 80).

Inasmuch as Old France had at that time a bewildering diversity of local Coutumes, it was necessary to select one of them for the colony.

That of Paris had long enjoyed a sort of pre-eminence, due partly to the intrinsic merit of the Coutume itself, and partly to the authority of the commentators who had illustrated it by their learning.

It was, in fact, asserted by some of the old writers that the "Coutume de Paris" (*la Maitresse Coutume*) was, in a certain sense, the common law of France.

But this seems doubtful. (Lareau, p. 140.)

Mr. Lareau speaks as follows in regard to the Coutume de Paris:

"The name of Coutume is given (says Pothier) to laws which usage has established, and which have been preserved, unwritten, through a long tradition. The Coutume de Paris deserves our attention on more than one account. Alone, or very nearly so, of all the Coutumes of France, it has been introduced and followed in Canada. The Coutume de Paris became the basal law of our land. It was the Canadian Code for three centuries, and, while undergoing some modifications, it remained up to the time of codification, the most important portion of our civil law. And even at the present day it possesses a real importance as a source of law."

The origin of the "coutumes" is a much debated subject, concerning which widely different opinions are held.

Dr. Lemieux, in his recent interesting book on "*Les Origines du Droit Franco-Canadien*," tells us that on two essential points the Juris-consults are agreed.

(1) The coutumes are different from Roman law, often they are opposed to it; it is not from it that they draw their origin.

(2) The coutumes of France (with some exceptions in the north and east) do not come from the barbaric and German laws. They are not of Germanic origin; they come from the feudal system (la féodalité) which is their origin.

The coutumes are the civil law of the feudal system (la féodalité).

But it often happened that some particular case was not provided for by the "coutume;" then recourse was had to Roman law, as a supplementary common law (droit commun supplétif).

Together with the Coutume de Paris came in also the general laws applicable to the whole of France, the Lois et Ordonnances as they existed in 1663.

The "ordonnances" were constitutions or decrees promulgated by the kings of France to be enforced throughout the whole Kingdom; they were enacted by virtue of the royal prerogative and affected every branch of the law. They did not always evidence an enlightened progress; on the contrary, in penal and criminal matters they were usually oppressive and retrograde in their character.

In addition to the Coutume de Paris, the student of French-Canadian law must consider the ordonnance of 1667 in reference to civil procedure.

"Toutes deux sont des lois fondamentales que la codification a pu remplacer, mais qui n'en restent pas moins importantes comme sources de droit." (Lareau, I., 150.)

The Ordonnance of 1667, which was due to the all pervading energy and foresight of Colbert, was prepared with the greatest degree of solemnity (ib. p. 151), the leading jurists of France being called to the task, and was the guide in all matters of practice and procedure, "la forme dans laquelle on doit intenter les demandes en Justice, y défendre, intervenir, juger, exécuter." (Ib. 150.)

"Elle fut avec la Coutume de Paris la loi fondamentale de Canada jusqu'à la codification." (Lareau, p. 155.)



“C’est la Coutume de Paris et l’ordonnance de 1667, sur la procédure civile, qui forment la base principale de notre droit sous l’ancien régime. La Coutume et l’ordonnance étaient citées par les praticiens et suivies par les juges, devant toutes les juridictions, depuis le conseil souverain jusqu’à l’humble cour seigneurale.” (Lemieux, p. 310.)

This Ordinance of 1667 is the basis of the present Code of Civil Procedure of Quebec.

The judicial organization of Canada under the Old Regime was specially complicated.

First, there was the King with his edicts and supreme authority; then came the Sovereign Council, which, from 1663, often sat as a court for the trial of disputes and criminal offences; the Governor himself frequently exerted a personal jurisdiction, while the Intendent undoubtedly wielded a larger and more constant individual authority than any other official. In addition to these, there was the Royal Justice, with Judges named or approved by the King, having jurisdiction in Quebec, Montreal, and Three Rivers; and there was also the Seigneurial Justice administered by the seigneurs and classified as High, Middle, and Low Justice, according to the gravity and importance of the matters involved. (The Old Regime, 3 Rev. Leg. N. S., p. 73.)

Canada was ceded to Britain in 1763 by the Treaty of Paris, and, after some years of uncertainty and dissatisfaction on the part of the French-Canadians in consequence of the introduction of English law by the Royal Proclamation of George III. in 1763, the Quebec Act was passed in 1774, by which it was enacted that “in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same.” By this the general body of French laws and customs in regard to civil rights, as they existed before the conquest, was reintroduced into old Canada. In describing the situation before this Act was passed, Dr. Lemieux says that it could be easily seen that the policy of the conquerors was to assimilate the laws of the new Province to those of England and even to abolish them almost completely. “The French-Canadians protested vigorously against this monstrous pro-

ject, and thanks to the protection of the statesmen of England, thanks to the liberality of the metropolis, they obtained a redress for their grievances, and the Quebec Act (1774) put the seal upon their rights." This Act, says he, was the first charter of the rights and liberties of the French-Canadians. In grateful recognition of it, the new subjects manifested an inflexible loyalty to the English crown, whilst the thirteen colonies proclaimed their independence and broke the colonial tie.

By the Quebec Act the French law as it was at the time of the conquest was declared to be the law for Canada; "*en rétablissant les lois françaises en 1774, le gouvernement Impérial rendit aux Canadiens la Coutume de Paris ainsi que le droit commun qui régissait le pays avant la cession.*" (Lareau, I., p. 142.)

This law introduced in 1774 was of course modified from time to time by provincial legislation, but the great body of it remained unchanged until the arrival of the next great epoch in the history of the French-Canadian law occasioned by the promulgation in France of the Code Napoleon.

The "Code Napoleon" or, as it is called under the Republic, "Code Civil," was promulgated under the authority of the great Emperor between the years 1804 and 1810, and was designed to replace the extreme confusion of the "*droit écrit et droit commun*" of France.

The part which Napoleon himself took in the preparation of the Code was, in the opinion of some writers, insignificant. Dr. Lemieux, however, while not attributing to him the principal part in the creation of the Code, credits him with frequent interventions in the work, marked by supreme good sense, astonishing clearness of vision, and a judgment free from prejudice.

Sir Henry Maine says that the "Code Napoleon" may be described without great inaccuracy as a compendium of the rules of Roman law then practised in France, cleared of all feudal admixture, such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists,

and particularly by Pothier. (Village Communities, p. 357.)

The opinion of this great French jurist on points of general law is treated with great deference in both English and American courts. "The authority of Pothier," said Chief Justice Best, "is as high as can be had next to the decision of a court of justice in this country." (Cox v. Troy, 5 B. & Ald. 481.) And Lord Blackburn, sitting in the House of Lords, stated: "We constantly in the English Courts, upon the question of what is the general law, cite Pothier." (McLean v. Clydesdale Banking Co., 9 App. Cas. 105.)

The Code Civil (says a learned writer) has inherited the riches of the ancient French law, the wisdom of the old customary law, the labours of DuMoulin, of Cujas, of D'Aguesseau, and of Pothier.

An eminent French jurist has said that more than three-fourths of the Civil Code consists of literal extracts from the works of Pothier; the compilers of the code seem to have had no knowledge of Roman law except as contained in the works of Pothier and Domat. Austin speaks of the profound ignorance of the authors of the Code on the subject of Roman law, of which, he says, the Code itself is little but a *réchauffée*.

Savigny, in his treatise on the Vocation of our Age for Legislation and Jurisprudence, called by Austin a "specious but hollow treatise on that subject," criticised severely, perhaps not very justly, both the preparation and the result of the Code Napoleon, but the influence that this legislation has had may well justify Napoleon's boast: "I shall go down to posterity with my code in my hand."

"The highest tribute" (says Sir Henry Maine) "to the French Codes is their great and lasting popularity with the people, the lay public, of the countries into which they have been introduced." (Village Communities, p. 357.) "So steady, indeed, and so resistless has been the diffusion of this Romanized jurisprudence, either in its original or in a slightly modified form, that the civil law of the whole continent is clearly destined to be absorbed and lost in it." (Ib. p. 358.)

The remarks of this eminent writer are worthy of perusal by persons inclined to undervalue the system of law in force in the Province of Quebec.

After the promulgation in France of the Code Napoleon, the profession in Lower Canada were in a quandary.

Judge Loranger tells us (Lemieux, p. 446) that the law had to be learned in the texts or commentaries published in France before the Code Napoleon, that the knowledge of the books in which one could study the law was almost a study in itself, scattered as the law was in hundreds of volumes.

Moreover, in addition, the treatises on the former law were not being reprinted in France, while the admirable ones published, dealing with the Code Napoleon, were useless to Quebec lawyers owing to the difference between it and the law in force in Quebec.

"The unhappy lawyers of Canada and Louisiana were left to beat their brains over crabbed old French commentators, whose works were now in France herself almost superseded." (Civil and Common Law in Canada, 5 Rev. Leg. N. S. 337.)

It therefore became necessary to collect and revise the laws.

The result was the present Civil Code.

In 1857, largely (it is said) through the energy of Sir George Cartier, an Act was passed appointing commissioners to codify the law of Lower Canada.

On 1st August, 1866, the Civil Code came into operation.

"To a very considerable extent indeed our Civil Code of Lower Canada simply reproduces in an abridged and abstract form the conclusions reached by the Roman lawyers fifteen or sixteen hundred years ago." (Value of Roman Law (Walton), 6 Rev. Leg. N.S. 371.)

Our Code (says Lareau) is an imitation of the Code Napoleon, considered as a masterpiece of modern legislation. (p. 276.)

In 1897 the new Code of Civil Procedure was put in force, the object of which was to abolish the confusion theretofore existing in the matter of procedure, and to establish

a system whose distinctive characteristics should be simplicity and celerity.

But although the bulk of Quebec law is derived from French sources, Quebec is not now a country wholly governed by the *droit civil*.

Important portions of it are drawn from the laws of England. For example:

(1) The Criminal Law, under the Criminal Code, 1892.

(2) The law of Bills and Notes.

This is governed by the Bills of Exchange Act, 1890 (53 V. c. 33), which closely follows the English Bills of Exchange Act.

(3) The law of Merchant Shipping.

(4) The law of Insurance.

This is mainly of English origin. It falls partly within the sphere of the Dominion and partly within that of the Provincial Parliament. (See *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96; The Insurance Act, R. S. C. 1886; Holt, *Insurance Law of Canada*.)

(5) The laws of Banks and Banking, regulated by the Bank Act, 1890.

A good deal of this is Canadian or American rather than English, but it is not of French origin.

(6) The rules of evidence in Commercial Matters are those of England, except in cases where the Code has specially provided otherwise. (5 Rev. Leg. N.S. 338.)

Cette division des pouvoirs entre les deux Parlements (of the Dominion and the Province) a formé chez nous un droit tout à fait hétérogène.

Ainsi, dans la Province de Québec, le droit civil et le droit paroissial sont français; le droit constitutionnel, le droit municipal, le droit criminel, le droit administratif, sont anglais; la procédure est un mélange de règles françaises et anglaises; le droit commercial est partie français, partie anglais; la preuve, française pour les matières civiles, devient anglaise en affaires de commerce.

Le droit anglais est celui de toutes les autres provinces.

Uniformité des Lois, 6 Rev. Leg. 16).

So much for the history and character of the French-Canadian law. It is now proposed, in this, and perhaps a second, paper, to consider some of the more striking points of difference between that law and the system in force in Ontario.

A very important distinction between the law under the Code and systems based upon the common law is the different value given to decided cases under them respectively.

"Case law is now the usual term for the law declared and developed by judicial decisions, and embodied in published reports of them." (Pollock's Jurisprudence, 228.)

And it is case law "our modern, our very modern conception of rigorous case law," that is of the most importance in England and countries which have derived their law from England.

"The decisions of superior courts of justice, and the reasons given for them, are treated as having eminent and all but exclusive authority." (Ib. p. 227.)

Austin speaks somewhat slightly of this doctrine:—"The childish fiction employed by our Judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the Judges. This being the case, of course there can be no *ex post facto* legislation in the English judiciary law." (II., p. 655.)

In practice, if not in theory, the common law of England has been manufactured by the decisions of English Judges. A judicial precedent speaks in England with a voice of authority; a reported case may be cited with almost as much confidence as an Act of Parliament; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established. (Judicial Precedents, 16 L. Q. Rev. p. 376.)

A Scotch Judge is reported to have said: "This puts me in mind of what Gulliver reports of the law of England, that if once Judges go wrong they make it a rule never to come right." (5 Rev. Leg. p. 344.)

The late Lord Watson, in an address given in 1883 and recently published (13 Jur. Rev. p. 11), says that one of the most eloquent of the last generation of Scotch Judges thought that it would be of great advantage to the law were all the reports of decided cases burnt, and all reference to them strictly prohibited.

Lord Watson, however, thought this opinion not likely to find much favour with lawyers of the present age; and Mr. Bryce, to judge from his most recent writings, would also object to this holocaust.

"There is," says Mr. Bryce, "a practicality about English case law, a firm grasp of facts and reality, as well as a richness and variety, which cannot be looked for in legal treatises composed even by the ablest and most conscientious private persons, who, writing in their studies, have not been enlightened by forensic discussion nor felt themselves surrounded by the halo of official dignity." (Roman and English Legislation, Studies in Jurisprudence, ii., p. 291.)

There are indications of a revolt against the reverence heretofore had for cases; for example, Lord Halsbury says (Quinn v. Leathem, [1901] A. C. p. 506): "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

This does not seem to differ much from the epigram of the civilians: *les arrêts sont bon pour ceux qui les obtiennent*.

And Lord Macnaghten (Keighley v. Durant, [1901] A. C. p. 248) speaks of the case of Bird v. Brown as follows: "The case is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reports, which always seem to carry the more weight the less opportunity there is of testing their accuracy. Why should an obscure report be taken for gospel merely because it is old?"

These statements justify Austin's words:—"We can never be absolutely certain (so far as I know) that any judiciary rule is good or valid law, and will certainly be followed by

future Judges in cases resembling the cases by which it has been introduced." (Austin's Jurisprudence, 5th ed., p. 655.)

It is said that the best expressed justification of this system of ascribing positive authority to decided cases is an opinion given to the House of Lords by Sir James Parke, afterwards Lord Wensleydale: "Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." (*Mirehouse v. Rennell* (1833), 1 Cl. & F. pp. 527, 546.)

In the Province of Quebec, on the other hand, and in all systems derived from Roman law, judicial authority is of no value. "Non exemplis sed legibus judicandum est."

"Exactly speaking, decisions have neither more nor less authority in France, Germany, or Italy at the present day than the opinions of learned persons expressed in any other form." (Pollock, 230.)

Previous decisions are instructive but not authoritative, they are instruments for the persuasion of Judges, but they are nothing more. (16 L. Q. Rev. p. 376.)

Recent Quebec writers put the position as follows. There are two systems:—

"The English system, in which the Judge is almost a legislator, and the French system, in which, according to the most weighty opinions, decisions only enjoy an authority based upon their reasonableness (*une autorité de raison*). It is, however, correct to say that decisions (*la jurisprudence*) are treated with very great respect. But they do not make the law, as in England, for the very simple reason that, in



this differing from English decisions, they are not a source of law (*droit*). In England there is only statute law and what is called "case law." The former is not very important (*considérable*) ; the latter is an inexhaustible mine. France is governed by written law ; in England, law for the most part, and even its much vaunted constitution, is unwritten. In one country, precedent is a binding rule ; in the other, it is only a guide." (*L'Autorité Judiciaire*, 6 *Rev. Leg.* p. 167.)

"The Canadian (i.e., French) law steers, as it were, a middle course between two theories which are separated by essential distinctions.

"Our French law is under the control of our Legislature : our English law is within the jurisdiction of the Dominion Parliament.

"When it is a question of interpreting our Civil Code, the decisions of our Courts, the Code Napoleon, the works of commentators upon it, French decisions (*jurisprudence*), the *Coutume de Paris*, the *jurisconsults* of the old regime, and even those of Rome, are our constant guides.

"When, on the other hand, we have to apply our English law, we are perforce compelled, in searching the origin of this law, to accept the interpretation which the English superior courts have placed upon it.

"It follows that for us the authority of decisions (*arrêts*) depends, in a certain measure, upon the law which has to be applied.

"But, as a general proposition, it may be said that judicial decisions (*jurisprudence*) have undoubtedly very considerable weight with us, although less authoritative than is the case in England. When a decision has been cited before one of our Courts, that does not end the matter. The counsel on the other side may attack the reasons for the decision, and, if he does so successfully, the Judge will decide in his favour." (6 *Rev. Leg.*, p. 168.)

In practice, however (as Sir F. Pollock points out), it is found that wherever decided cases are made accessible by regular reporting, their influence tends to gain on other forms of "scientific law," and *jurisprudence* to assume a more dis-

tinctly national character. (Pollock Jur. 230; cf. Holland, 7th ed., p. 60.)

He says "where the two systems have come into competition, as they have done in the Province of Quebec, the Cape Colony, and other British possessions originally settled under continental systems of law, the method of ascribing exclusive authority to judicial decisions has invariably, so far as I know, been accepted." (Pollock Juris. 325.)

Professor Walton, in an interesting and very instructive article on the "Civil Law and Common Law in Canada" (5 Rev. Leg. 329), states that in his opinion the law of Quebec exhibits a strong tendency in the direction of following precedents with the same certainty as in England.

This is not unnatural when we consider the composition of the Courts of ultimate appeal from the provincial Courts, the Supreme Court of Canada and the Privy Council.

Professor Walton says: "The Judges of the Privy Council, and most of the Judges of the Supreme Court of Canada, are thoroughly imbued with the spirit of the common law as to the value of cases. And in the Courts within the Province, the reported cases are consulted and relied upon to a greater extent than is done in France or Germany. Apparently the rule that cases ought to be followed is gradually becoming more fixed."

A curious result of the working of the French Code is to be found in the conflicting opinions of French lawyers which occasionally appear in English Courts.

In one case a very eminent English Judge, remarking on a conflict of opinions given by twelve or thirteen of the most eminent French advocates, observed: "I am not aware whether the Judges of France (administering law under codes) differ among themselves seldomer than those of England, who, in addition to the unwritten law and plain statutes, are occasionally required to expound legislative riddles, such as might have saved the Sphinx. But I am satisfied, so far as relates to counsel, that Westminster Hall has never exhibited a more amazing conflict of opinions upon English law than that which well-propounded questions upon French law (which had been submitted by Master Tinney) have

raised at the Parisian Bar among so many of its eminent members,—a conflict not encouraging to those who look to codes, whether universal or partial, as being, at least when not prepared by quacks and sciolists, a kind of panacea of legal uncertainty.” (Per Knight Bruce, V.-C., *Guépratte v. Young*, 4 DeG. & Sm. p. 221.)

So much by way of general introduction.

Let us now proceed to examine, in the limited way which is possible, into some details of the Code law.

In the first place one is struck by the absence of Real Property law.

That vast structure, built up by generation after generation of English lawyers, so full of technicalities and refinements, is not visible in the legal landscape of Quebec; the common law “heir” has disappeared.

At common law, property in and the mode of acquiring land is a distinct study from that which relates to goods.

By the code law of succession, as by the Roman, there is no discrimination between property in lands and that in goods, between realty and personalty.

“Autrefois on semblait regarder la propriété immobilière comme la base de la stabilité de l’état; la société moderne a adopté un autre point de vue.

“La multiplicité des transactions fait que la propriété réelle change de main avec autant de rapidité que la propriété mobilière. Le consentement, une fois donné, rend le contrat parfait. La tradition n’est plus nécessaire.” (Lareau, p. 277.)

It is true that the Code (Art. 374) retains a distinction, *ex necessitate rei*, between movable and immovable property, into which two classes it divides all property; but for the purpose of succession and distribution, all property is considered in the bulk. “The law, in regulating the succession, considers neither the origin nor the nature of the property composing it. The whole forms but one inheritance which is transmitted and divided according to uniform rules or the dispositions made by the proprietor.” (Art. 599.)

This Article put an end to the complicated distinctions of the old French law which prevailed in Lower Canada before the Code.

Accordingly, on the death of a person intestate, there is no distinction in regard to the devolution of his estate, no difference between the heir-at-law and the next of kin.

The whole mass, whether it be real or personal, movable or immovable, in such a case goes to the relatives in the order established by law.

The words "heir" and "heirs" are, it is true, to be found in the Code as descriptive of the persons upon whom succession devolves, but they are not used in the restricted sense known to English law as referring to the person on whom the real estate of a deceased intestate devolves, but as indicating the person or persons upon whom the succession devolves, whether under a will or according to the law of intestate succession in the order fixed by the Code.

Nor is any instrument under seal (in the English sense) necessary for the conveyance or transfer of real estate. Private seals, though often used, are unnecessary, and give no additional force to the signature of a party to a deed. Conveyances of real estate are as compared with other contracts subject to no special form.

This would not have pleased that great jurist, Kent, who said that "we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well established and venerable a practice as the use of seals in the authentication of deeds."

This general rule must, however, be stated with two qualifications: (1) certain deeds (as for example mortgages or hypothecs except in certain localities) must, to be valid, be in notarial form; (2) a deed which is not capable of registration is quite worthless as a title to, or as affecting real estate; vide Art. 2098, C. C. This necessity of complying with the registration laws, which are very strict in matters of form, puts instruments requiring registration, which with few exceptions are confined to transactions with real estate and of course include all such transactions, upon an entirely different footing from other deeds. An instrument, to be re-

gistered, must be either in notarial form or executed before two witnesses and proved by an affidavit of one, before certain officials designated in the Code. It is, however, very exceptional to have a deed of real estate other than in notarial form.

The parties sign a deed of sale before a notary in notarial form; this the notary keeps on record in his office, giving to the parties certificates under his seal of the transaction, which are "authentic," and can be and are registered.

#### The Statute of Frauds.

This important enactment, of which Lord Keeper Nottingham said in admiration "Every word was worth a subsidy" (which eulogy has been changed by a less ardent admirer of the statute, to "Every word has cost a subsidy"), and of which a recent editor of Kent's Commentaries writes that "it carries its influence through the whole body of our Civil Jurisprudence and is in many respects the most comprehensive, salutary and important legislative regulation on record, affecting the security of private rights" (Kent's Commentaries by Lacy, Black. ed., p. 642) exists indeed, but greatly altered. Heu! quantum mutatus.

It may be noticed, in passing, that Lord Nottingham was perhaps not an unprejudiced judge as to the merits of the statute, for he claimed to have been its father:—"I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the Judges and the civilians." (Ash v. Abdy, 3 Swanst. 664.)

The statute was in force in Canada long before the Civil Code was enacted, having been introduced in 1785 by the Act 25 Geo. III. c. 2, s. 10, which brought the English Rules of Evidence into the Province, but it was modified in 1847 by statute (which purported also to enact the additions made by Lord Tenterden's Act) and in subsequent consolidation. (R. S. L. C. c. 67.) What remains of this famous statute, after passing through the hands of the codifiers, may be found in Article 1235 of the Code.

That this Article is derived from the statute has always been recognized; it is construed according to English rules, and English decisions under the statute have always been considered as precedents in cases arising under the Article. (See *Munn v. Berger*, 10 S. C. R. p. 512.)

The Article is as follows:—

“In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives, unless there is a writing signed by the former, in the following cases:

“(1) Upon any promise or acknowledgment whereby a debt is taken out of the Statute of Limitations;

“(2) Upon any promise or ratification made by a person of the age of majority, of any obligation contracted during his minority;

“(3) Upon any representation, or assurance in favour of a person to enable him to obtain credit, money, or goods thereupon;

“(4) Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

“The foregoing rule applies although the goods be intended to be delivered at some future time or be not at the time of the contract ready for delivery.”

On examining the Article it will be seen that paragraphs 1 and 2 reproduce part of section 1 and of section 7 of Lord Tenterden's Act; paragraph 3 reproduces part of section 5 of Lord Tenterden's Act; paragraphs 4 and 5 reproduce section 17 of the Statute of Frauds, and section 7 of Lord Tenterden's Act.

The points of difference between the Article and the 17th section of the Statute of Frauds to be noted are:

The Article applies to all cases, not merely to contracts of sale; there is no reference to the effect of payment on account (“part of payment”); it is not necessary that there should be both acceptance *and* receipt, the words of the Article are “acceptance *or* receipt;” the Article applies both to a

demand made and defence raised; it only applies to commercial matters. (See as to part payment the case of *Charest v. Murphy*, R. J. O. Q. 3 Q. B. 376.)

It should be mentioned that the general rule applicable to commercial matters—that oral evidence is sufficient—(the exceptions to which are found in above Article 1235) is itself an exception to the general rule laid down in Article 1233, which provides (after enumerating certain exceptions, of which proof of “all facts relating to commercial matters,” is one) that in all other matters proof must be made by writing or by the oath of the adverse party.”

“In the Province of Quebec it may be said that there are two general rules regulating proof (i.e., evidence) in all suits brought before the tribunal; one applicable to civil cases only, the other to commercial matters alone.

In civil cases the general rule is that proof must be made by writing or by the oath of the adverse party. (3 Rev. Critique, 430.)

In commercial matters, on the other hand, the general principle is (Art. 1233), that proof by testimony is admissible “of all facts concerning commercial matters,” but to this principle there are some important exceptions, and amongst others those of Article 1235, above set out.

There are also some exceptions to the general rule in regard to civil cases. (See Art. 1233.)

These two Articles, 1233 and 1235, the one applicable to non-commercial matters, having its origin mainly in French law, and the other, applicable to commercial matters, having its origin exclusively in English statutes, furnish a good illustration of the double source of much of the law of the Province of Quebec.

(To be concluded.)

Toronto.

N. W. HOYLES.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Arbitration.]**—In *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society*, 19 T. L. R. 155, a condition in a life insurance policy, that as to all disputes which might arise out of the contract all parties interested agreed to submit to the jurisdiction of the Courts at a named foreign city, was held by the Court of Appeal to be equivalent to a condition submitting all disputes to a named arbitrator, and an action in England was stayed. The same effect has very recently been given by Meredith, J., in *Nolan v. Ocean Accident and Guarantee Corporation*, to an arbitration condition in an accident policy.—In *Foster and Dicksee v. Mayor of Hastings*, 19 T. L. R. 204, special provisions as to arbitration contained in a building contract are dealt with.

**Auctioneer.]**—*Halleronn v. International Horse Agency*, 19 T. L. R. 138, is a curious example of the uncertainty of law, or rather of legal proceedings. The plaintiff, an auctioneer, advertised for sale in France a mare sent to him by the defendants, represented to be, and advertised to be, a specific named animal. Thereupon an action was brought against the auctioneer in France by a person who alleged that this representation was false and that he was the owner of this named animal, made out this case at the trial, and was awarded substantial damages. The auctioneer in his turn brought this action against the defendants alleging that the mare sent by them to him was not the animal she had been represented to be and claiming as damages the amount of the French judgment. But in this action the defendants succeeded in establishing that their mare was the true mare and not a horse of another colour and that therefore the French judgment had been founded on a mistake of fact. It was held, therefore, that as the damages recovered against the unfortunate auctioneer arose, not from any act done by him in

\* Including the cases in No. 11, Vol. 19, week ending February 4th, 1903.



pursuance of his employment by the defendants, but from a mistake as to the identity of the mare for which the defendants were not responsible, he was not entitled to indemnity from the defendants.

**Carriers.]**—In *Upperton v. Union-Castle Mail Steamship Co.*, 19 T. L. R. 123, the defendants were held to have been guilty of negligence in the manner of storing the plaintiff's luggage, and liable for the damage thereto, a condition in the plaintiff's ticket not being wide enough to protect them.

**Chose in Action.]**—The principle that in the case of two assignments of a chose in action priority of notice prevails is applied in *In re Lake*, 19 T. L. R. 116, to assignments by way of mortgage of life insurance policies, and the assignee who was second in point of time but first in giving notice to the companies of his assignment was held entitled to priority.

**Club.]**—*Wise v. Perpetual Trustee Co.*, 19 T. L. R. 125, is a useful case on club law, settling as it does on the high authority of the Judicial Committee, the question of the extent of the right of trustees of an ordinary club to contribution from the members thereof to disbursements made by the trustees for the benefit of the club. The ordinary right of lien on the trust property exists, but there the analogy to the case of trustee and cestui que trust stops, and in the absence of special regulation assented to by, or special agreement of, the members, the right to reimbursement does not arise. "Clubs are associations of a peculiar nature. They are societies the members of which are continually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member."

**Company.]**—The old question of estoppel by certificate comes up again in *Monarch Motor Car Co. v. Pease*, 19 T. L. R. 148, an action for calls on shares held by the defendant. These shares had been allotted to the defendant at the instance of a promoter, and purported to be fully paid up

shares, and a certificate to that effect had been issued by the company. The promoter was to have paid the company for the shares but had not done so, though the defendant did not know this. It was held that the company was estopped, the contention that, as the defendant had not acted upon the representation, estoppel did not arise being overruled, for he had, at all events, lost the opportunity of proceeding against the promoter, and quiescence is sufficient to create estoppel.

**Constitutional Law.]**—The Japanese naturalization case is reported 19 T. L. R. 126, sub nom. *Collector of Voters of Vancouver City v. Tomey Homma*.

**Contract.]**—In *Blow v. Lewis*, 19 T. L. R. 127, it was held that a provision in an agreement for the letting of a theatre that the agreement was to be null and void in the event of the theatre being closed on account of any public calamity, Royal demise, epidemic, fire, or accident, "or when theatrical performances are suspended from any cause whatever," did not apply to the case of the theatre being closed during the making of some structural alterations ordered by the licensing authority, and the lessor was mulcted in damages.—*Blakeley v. Muller and Co.*, 19 T. L. R. 186, *Hobson v. Pattenden and Co.*, 19 T. L. R. 186, and *Clark v. Lindsay*, 19 T. L. R. 202, are "coronation seats" cases, the seat-holders in each case failing to get back the money paid by them to the seat-owners, the Divisional Court holding that the principle of *Taylor v. Caldwell*, 3 B. & S. 826,—performance excused where performance becomes impossible from some cause for which neither party is responsible, and as to which there has been no specific agreement or warranty—applied, but that that principle did not go far enough to enable a party to a contract to recover back money paid before the happening of the event which renders further performance impossible. *Krell v. Henry*, 18 T. L. R. 823, noted 22 C. L. T. 362, in so far as it directed repayment, was disapproved.

**Copyright.]**—The Court of Appeal [*Romer* and *Stirling*, L.J.J., *Vaughan Williams*, L.J., dissenting] affirm, in interesting judgments, 19 T. L. R. 133, the judgment of *Joyce, J.*, in *Afdlo and Cook v. Lawrence and Bullen*, 17 T. L. R.

729, noted 21 C. L. T. 446, as to the copyright in articles prepared for an encyclopædia, the conclusion being that under the Imperial Act, in the absence of any peculiarity in the nature of the publication or of any special circumstances in the terms of the employment, the copyright in the article belongs to the contributor.

**Costs.]**—While dealing primarily with a question of County Court jurisdiction not of application in Ontario, *Dunn v. South-Eastern and Chatham R. W. Co.*, 19 T. L. R. 161, states in a concise form the rule that, in an action of negligence where the defendant while denying liability pays into Court a sum of money in satisfaction of the claim and the plaintiff succeeds on the issue of negligence but recovers damages only equal to or less than the sum paid in, and the action is thereupon dismissed, there is a discretionary power to give the plaintiff the costs of the issues on which he has succeeded. This discretion exists where a new trial has been ordered, costs of former trial “to abide the event.”

**Counterclaim.]**—The plaintiff in *Bankes v. Jarvis*, 19 T. L. R. 190, sued for the purchase money of a business sold to the defendant by him as agent for a third person, to whom he would have to account for the money if recovered. It was held that the defendant was entitled to counterclaim against the plaintiff, by way of answer to the claim, damages for breach by the third person of that third person's covenant with the defendant in a lease of a house taken in connection with the business.

**Criminal Law.]**—The trial of *Lynch* for treason is fully reported—*Rex v. Lynch*—in 19 T. L. R. 163.

**Defamation.]**—An ambiguity in one of the questions to the jury necessitated a new trial in the slander action of *Collins v. Cooper*, 19 T. L. R. 118. The plaintiff, who had been suspected by the defendant of being concerned in the theft of certain articles from his house, called at the defendant's request at his house to discuss the matter. After some discussion the defendant brought to the room four boys, boarders in the house, and a maid-servant, and in the plaintiff's presence asked them whether the plaintiff was “the person who

came and took the things away," to which the answer was "Yes." The occasion was held to be privileged, and the jury's finding, that the question imported an imputation that the plaintiff had been concerned in a crime, and, therefore, was slanderous, proper. But a further affirmative finding in answer to the question "Did the defendant reasonably believe that the plaintiff took away the things?" was held to be too ambiguous to be acted upon, the proper test being honest belief not reasonable belief.

**Factory Acts.]**—The Imperial Factory Act, 1901, wide as it is in its terms, was held in *Toller v. Spiers and Pond*, 19 T. L. R. 119, not to cover, in regard to regulations for fire protection, the case of a building owned by one person and leased by him in two parcels to independent manufacturers, so as to enable the owner to carry out desired improvements as a whole affecting both manufacturers. The same difficulty would a fortiori arise under the narrower terms of the Ontario Act, R. S. O. 1897 c. 256, s. 21, as amended by 1 Edw. VII. c. 35, and 2 Edw. VII. c. 36.

**Foreign Land.]**—After a hearing upon the point of law, the case of *In re Clinton, Clinton v. Clinton*, 19 T. L. R. 181, was ordered to go down for trial, the jurisdiction of the English Court to try a dispute, between persons resident (apparently) in England, as to whether there was or was not a trust affecting land in an English colony, being upheld. Compare *Gunn v. Harper*, 2 O. L. R. 611.

**Landlord and Tenant.]**—In *Jaegers v. Mansions Consolidated*, 19 T. L. R. 114, the very practical question of the nature and extent of the covenant for quiet enjoyment is dealt with by Buckley, J., in an interesting judgment in which many of the authorities are referred to, the conclusion arrived at being that "a covenant that a tenant shall quietly hold and enjoy without any interruption by the landlord or any person claiming under him, relates only to freedom from disturbance by adverse claimants, not necessarily limited to the turning out of the tenant, but extending to physical interference with the use of the property demised as distinguished from its comfortable enjoyment. There

must be physical, and not a merely metaphysical, disturbance—a taking away or disturbance of the tenant's physical user of the premises. . . . The result is that on the covenant for quiet enjoyment the plaintiff cannot sue in respect of noise or disagreeable sights or sounds,"—the complaint being that the plaintiff, who was tenant of flats in a large building, was, owing to the use of other flats by other tenants for immoral purposes, annoyed by noise, improper conduct, and obnoxious language, especially on the common staircase. On the ground that the plaintiff might be able to shew acquiescence by the landlord in the wrongful acts complained of, or perhaps be entitled to enforce, or compel the landlords to enforce, as against the other tenants a covenant, contained in all the leases, not to use the premises for immoral purposes, the action was directed to go down to trial, the judgment in question having dealt merely with the points of law. The Court of Appeal affirmed the judgment, 19 T. L. R. 145, on the ground that a cause of action might possibly be made out, and to some extent at least approved of the principles of law formulated by Buckley, J.—Lord Howard de Walden v. Barber, 19 T. L. R. 13, is another landlord case which will no doubt appear again later on. Under a special form of covenant (set out in the report and worth noting as a precedent) restricting the mode of user of the demised premises, an assignee of the lease was held liable for the amount fixed by the covenant as payable upon its breach, and not merely for damages to be assessed, and this though he had no knowledge of the breach, which had however undoubtedly occurred.—In *Zimble v. Abrahams*, 19 T. L. R. 189, the Court of Appeal came to the conclusion that a somewhat curiously worded document, by which the plaintiff "let to (the defendant) the house . . . at a weekly rental of twenty-three shillings, and I agree not to raise (the defendant) any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit"—was in effect an agreement for a lease to the defendant for life, and subject to the defendant electing to take specific performance of the agreement and paying the arrears of rent, the plaintiff's action to recover possession of the house, based upon a notice to quit, was dismissed.—In *In re Mostyn and Fitz-*

simmons, 19 T. L. R. 191, the tenant was, under the special covenant in question, held liable to pay the costs of an arbitration to fix the renewal rent.—Wright v. Lawson, 19 T. L. R. 203, dealt with a question of repair. Pursuant to notice from the London County Council the lessee of a house, who had covenanted to repair, took away an overhanging bay window which was in a dangerous condition, and made instead a window in the main wall of the house. It was held that this was a sufficient compliance with the covenant, it having been proved that the only practicable way of preserving the bay window would have been to support it by columns from the ground, and that, it was held, would have been building a new window, not repairing an old one.

**Master and Servant.]**—Smith v. Normanton Colliery Co., 19 T. L. R. 128, while decided upon the facts, to some extent throws light upon the question of when an accident may be said to have occurred in the course of the workman's employment. It was held that where a colliery lad had been suspended from employment but remained loitering in a part of the mine where he should not have been, and was injured about two hours after the time of his suspension by a fall of coal from the roof, the accident had not taken place in the course of his employment.—Losh v. Richard Evans and Co., 19 T. L. R. 142, deals with a similar question, and a girl who, in spite of a warning not to do so, meddled with machinery it was no part of her duty to touch, and was injured, was held not to have been injured in the course of her employment, and therefore not entitled to damages.—The short point decided in Stephenson v. London Joint Stock Bank, 19 T. L. R. 138, is that resigning a position in consequence of an official request to do so, did not bring the resigning official within the purview of a rule providing for retiring allowances to officials "retiring with the consent of the directors." The opinion was expressed, moreover, though not necessary to the decision, that resigning in this way was not equivalent to dismissal.

**Mistake.]**—Scott v. Coulson, 19 T. L. R. 162, is an example of the principle that a contract entered into under a common mistake as to a material fact will be set aside, and

this even after completion if there is promptness and the parties can be restored to their original position. The contract set aside was one by the holders of a life policy for the sale of it, the life having in fact dropped, though neither vendors nor purchasers knew this. This ignorance distinguishes the case from *Potts v. Temperance and General Life Assurance Co.*, 23 O. R. 73, where a somewhat similar transaction was in question.

**Nuisance.**]—Statutory power to do work is not statutory power to do the work in such an unreasonable and vexatious way as to constitute a nuisance, and in *Roberts v. Charing-Cross, etc., R. W. Co.*, 19 T. L. R. 160, the plaintiff was held to have a good cause of action against the defendants, who in building a station near the plaintiff's house, as they had the statutory right to do, carried on work night and day, this being charged to be, and admitted for the purpose of the argument to be, unreasonable and unnecessary. See *Gareau v. Montreal Street R. W. Co.*, 31 S. C. R. 463, and *Hopkin v. Electric Light and Cataract Power Co.*, 2 O. L. R. 240, and the cases there cited.

**Patent.**]—In *Saccharin Corporation v. Wild and Co.*, 19 T. L. R. 154, the plaintiffs relied on twenty-three patents, alleging infringement of all. On the ground that such a combination of claims "tended to prejudice, embarrass, or delay, the fair trial of the action," the defendants obtained an order directing the plaintiffs to limit the claim to any three patents the plaintiffs might select, the defendants thus being relieved from the great difficulty and expense of examining each of the twenty-three patents, deciding as to their validity, and delivering particulars as to those alleged to be invalid.

**Solicitor.**]—In *re Baker Lees and Co.*, 19 T. L. R. 113, depends upon the application of the principle laid down in *Allen v. Aldridge*, 5 Beav. 401, that in order to obtain taxation of a solicitor's bill the business in connection with which the charges in question have been made must be business in which the solicitor would not have been employed if he had not been a solicitor. The Court of Appeal held that a bill of costs of a person who was both a solicitor and a parlia-

mentary agent for work done exclusively as a parliamentary agent in connection with a private bill was not subject to taxation. Some weight was evidently given by the Court to the fact that there are in England special statutory regulations as to charges of this kind, applying to all parliamentary agents, whether solicitors or not. A similar question has been dealt with in *O'Connor v. Gemmill*, 26 A. R. 27.—That an action for negligence against a solicitor survives as against his personal representative is the short point decided in *Davies v. Hood*, 19 T. L. R. 158, such an action being based upon the breach of the implied duty, arising out of the contract of employment, to bring proper skill to bear on the business. See *Laidlaw v. O'Connor*, 23 O. R. 696; and also R. S. O. 1897 c. 129, s. 11.

**Statute of Frauds.]**—*Smith v. Gold Coast and Ashanti Explorers*, 19 T. L. R. 152, gives the authority of a Divisional Court to the dictum in *Cawthorne v. Cordrey*, 13 C. B. N. S. 406, and *Britain v. Rossiter*, 11 Q. B. D. 123, that a contract of service for a year, made on one day and the service to begin on the next, is not a contract “not to be performed within the space of one year,” and therefore may be enforced though not in writing.

**Will.]**—A gift to the Carriers’ Company of £5,000 to be invested in such securities as the Master and Court of the Company might select, the revenue to be expended at the option of the Master and Court “as to two-thirds in charity or works of public utility, and as to the remaining one-third for the benefit or hospitality of the company.” was, in *Langham v. Petersen*, 19 T. L. R. 157, held as to the two-thirds to be only in part charitable, and void for uncertainty, and as to the other third to be an absolute gift.—The judgment in *In re Greenwood*, *Goodhart v. Woodhead*, 18 T. L. R. 530, noted 22 C. L. T. 216, was reversed by the Court of Appeal: 19 T. L. R. 180. That Court held that the condition in question—assuming the testator’s name—was a condition subsequent, not requiring to be fulfilled till the devised remainder came into possession, and that, being then by an act of God—insanity of the devisee—incapable of fulfilment, there was no forfeiture.



## EDITORIAL REVIEW.

**The Alaska-Canada Boundary Dispute.**

The convention between Great Britain and the United States for the appointment of six impartial jurists to settle the boundary dispute has been ratified by the Senate of the United States, and the President has appointed the three United States jurists. At the time of writing the three British jurists have not been appointed. It is probable that at least one of them will be a Canadian. It is said that Mr. Edward Blake, K.C., has been appointed counsel for Canada and has accepted the appointment. He is emphatically the right man. Reported utterances of one of the jurists appointed by the President cast a doubt upon his impartiality, at least if a man's opinion already formed makes him a partisan, as in common estimation it does. It would certainly have been better if the President had seen his way to appoint eminent lawyers who had not, at least publicly, expressed opinions upon the points in dispute. If the appointments as made are to stand, the award will be looked forward to with curiosity. Will it be a disagreement or a compromise?

**The Late Judge McDougall.**

The high esteem in which the late Judge McDougall was held by all classes of his fellow-citizens was marked by an enormous attendance at his funeral, and by tributes in the press and remarks made by many speakers in public places. He did an extraordinary amount of work and did it well and thoroughly. He maintained the dignity of his office, and at the same time was thoroughly democratic in his ways, easy of access, and possessed of a spirit of camaraderie which made his intercourse with members of the Bar most agreeable to them. Undoubtedly he hastened his end by his own over-devotion to his duties. Hard worker as he was, he never appeared to be hurried, but was ever calm, deliberate, and courteous. His place will indeed be a hard one to fill.

**The New Admiralty Judge.**

One of the judicial offices held by Judge McDougall has been filled by the appointment of the Master in Ordinary as Local Judge in Admiralty of the Exchequer Court of Canada for the district of Toronto. Mr. Thomas Hodgins, K.C., is so well known as a lawyer, and has so great a reputation for industry and learning, that it would be idle to recount his qualifications. At an age when most men would be seeking retirement, he seems to be as vigorous as a youth, and to be undertaking new and additional judicial duties with unquenchable ardour. He was sworn in at Osgoode Hall on the 16th February by the President of the High Court of Justice, in the presence of a large assemblage of the Bar.

**The York Surrogate Court.**

There has recently been some discussion in the press as to the possibility of a separate Judge being appointed to the Surrogate Court of the County of York. The late Judge McDougall was a tremendous worker, and was very thorough in his administration of the Surrogate Court. The burdens of the office grew in his time, and the volume of business done in recent years has been very great. We referred to this subject in 1901, at p. 75 of vol. 21, where some statistics were given. We see that in 1901 the yearly income from the Surrogate Court was about \$11,000; the value of estates, over \$1,000,000; number of letters probate, letters of administration, letters of guardianship, etc., issued, about 850. Accounts must also have been passed in a large number of cases. The appointment of a competent lawyer, with a special turn for accounts, as Surrogate Judge, would be a good thing for the county. The business is quite sufficient to take up the time of one man, and if he were the right man, there would be a considerable advantage in having him free from other judicial work.

**The Lynch Treason Case.**

The trial of Arthur Lynch for high treason in taking up arms with the Boers against his own Sovereign and country resulted, as every one expected, in a conviction. Whatever

may be thought of other forms of treason, there can be no doubt that fighting against one's own country is a serious crime against society. In passing sentence of death Mr. Justice Wills remarked: "If every one who disapproves of the foreign or domestic policy of his country is at liberty to take up arms against her, and to attempt to join her enemies to her destruction, the very foundations of civilized society would be gone, and violence and anarchy would take the place of ordered government." Lynch's sentence was afterwards commuted to penal servitude for life.

#### **Solicitors Plundering Estates.**

Some very severe remarks were recently made by Mr. Edge, Judge of County Courts, at the Clerkenwell County Court, in relation to the conduct of a solicitor, who, in the opinion of the Judge, had attempted to wreck an estate by running up and incurring unnecessary costs. What could any one think, asked the Judge, of a solicitor who brought in a bill of costs for £102 against an estate of £180? And he disallowed the whole of the solicitor's profit costs, leaving him £44 disbursements, and made him pay £25 towards the costs of the other side. His Honour further expressed his intention of laying the facts of the case before the Law Society. A "Windsor Barrister," commenting on this, writes: "It strikes me very forcibly as being applicable to several cases in our own Courts, and if our own Judges would take the same drastic measures in similar cases, the results would be beneficial to the profession and the public at large."

#### **The County of York Law Association.**

The report of the board of trustees of the County of York Law Association for 1902 was presented at the annual meeting held on the 26th January, 1903. The trustees state that the change in the situation of the association's library and reading rooms from the old court house in Adelaide street to the new one in Queen street west, has not impaired the usefulness of the library to its members at large, while to the Judges and those of the members who are engaged in the courts held in the new buildings, its utility has been increased. There are now 303 members, a decrease of 10.

Three members died during the year: Mr. R. M. Wells, K.C., Mr. Stephen M. Jarvis, and Mr. A. J. Boyd. One member, Mr. J. J. MacLaren, K.C., was promoted to the Bench.

The trustees forcibly contend that there should be an increase in the salaries of the Judges. They put the case thus:

"The present period of prosperity particularly emphasizes the necessity for such an increase, in that, while the cost of living has become much higher, the salaries of the Judges have remained stationary, and what was recognized as a hardship and incongruity a few years ago, is still more apparent at the present period. The salary now offered is so small that it requires much self-sacrifice on the part of a man of ability and standing in his profession to resign a lucrative practice for the purpose of serving his country in this important department."

The association's library now contains 4,685 volumes; 183 volumes were added in 1902; the most important additions were: The State Trials, New Series, 18 vols.; the English Patent Reports, 18 vols.; the Railway and Land Traffic Cases, 10 vols.; and a number of works upon the constitution and constitutional history of Canada.

The Association is prospering financially and has an excellent Librarian in Miss A. M. Read.

The following officers were elected for the ensuing year:

Mr. J. B. Clarke, K.C., President; Mr. Hamilton Casals, K.C., Vice-President; Mr. Walter Barwick, K.C., Treasurer; Mr. Angus MacMurchy, Curator; Mr. Shirley Denison, Secretary. Messrs. D. E. Thomson, K.C., Wm. Davidson, E. F. Gunther, R. J. MacLennan, W. E. Middleton, D. W. Saunders, C. S. MacInnes, Board of Trustees. Mr. D. T. Symons and Mr. D. Urquhart, Auditors.

#### **Recent American Decisions.**

*Award.*—A claim arising out of an illegal transaction is held, in *Singleton v. Benton* (Ga.), 58 L. R. A. 181, not to be a legitimate subject-matter for submission to arbitrators, and an award founded thereon is held to be a mere nullity. With this case is a note as to effect of award upon claim arising out of illegal transaction.

*Bank.*—A bank receiving for collection from a correspondent bank a draft indorsed by the payee in blank, without notice that the correspondent holds the draft for collection only, is held, in *American Exch. Nat. Bank v. Theummler* (Ill.), 58 L. R. A. 51, not to be liable to account therefor to the payee, where, before receiving notice of the insolvency of the correspondent, it applies the proceeds in reduction of the correspondent's overdraft.

A rule of a savings bank that the institution will not be responsible for loss sustained by payment to a stranger when the depositor has not given notice of loss of his book, is held, in *Ladd v. Augusta Savings Bank* (Me.), 58 L. R. A. 288, not to relieve the officers of the bank from the exercise of reasonable care to protect the interest of the depositor, and prevent loss to him by payment to a person not entitled thereto.

*Contingent Claim.*—A claim against the estate of a deceased person, not allowable in the administration proceedings because it is contingent in character, is held, in *South Milwaukee Co. v. Murphy* (Wis.), 58 L. R. A. 82, not to be affected by the statute of limitations while such character exists. The contingency of a claim, as affecting limitation of time for its presentation, is considered in a note to this case.

*Evidence.*—For the purpose of shewing the condition of the internal tissues of the body, "X-ray pictures" are held, in *Geneva v. Burnett* (Neb.), 58 L. R. A. 287, to be admissible in evidence.

*Ice on Sidewalk.*—The liability of an abutting owner for injury from a fall on ice on a sidewalk, formed from water from his drainpipe, is held, in *Brown v. White* (Pa.), 58 L. R. A. 321, not to be modified by the fact that it is customary in the municipality to drain water from roofs and waste pipes across the pavement to the gutter. A note to this case collates the other authorities as to liability for permitting water to accumulate and freeze on the sidewalk to the injury of travellers.

*Injunction.*—An injunction to prevent a baseball player from violating his contract to serve a certain organization for a stipulated time, during which he is not to play for any other club, is held to be allowable, in *Philadelphia Ball Club v. Lajoie* (Pa.), 58 L. R. A. 227, where he is an expert player, and is an attractive drawing card for the public because of his great reputation for ability in the position which he fills.

*Intoxicating Liquors.*—An agent of an express company, who, in good faith, delivers to the consignee, or upon his order, goods carried by his principal, consigned C. O. D., and collects the charges thereon, is held, in *State v. Cairns* (Kan.), 58 L. R. A. 55, not to be guilty of selling intoxicating liquors to the purchaser, though he has reason to believe, or knows, that the goods so consigned and delivered are intoxicating liquors.

*Release of Joint Tort-feasors.*—A release for a consideration paid, of one of two persons jointly liable for personal injury to another, from further liability to respond for such injury, is held, in *Abb v. Northern P. R. Co.* (Wash.), 58 L. R. A. 293, to release the other also, although there is an express stipulation that it shall not have that effect. The effect of the release of one joint tort-feasor on the liability of another is discussed in a note to this case.

*Street Railways.*—The exception which permits a recovery by one guilty of contributory negligence, if his negligence is not the proximate cause of the injury, is held, in *Rider v. Syracuse Rapid Transit R. Co.* (N.Y.), 58 L. R. A. 125, not to be applicable in favour of one who is struck and injured in attempting to drive across the tracks in front of an approaching electric car, merely because the pressure of the car upon the waggon is not relaxed for some inappreciable time after the collision, during which the horse and waggon are carried forward for some distance until the waggon is overturned and the driver injured.

Contributory negligence of one injured by collision with a street car when attempting to drive across the tracks is held, in *Keenan v. Union Traction Co.* (Pa.), 58 L. R. A. 217, to prevent recovery where, at a distance of 35 feet from

the track, he looks along the track 319 feet, and, seeing no car coming, walks his horse across the track without again looking for a car, his duty being to continue to look until the track is reached.

That a child six years old is permitted to go to a school less than two blocks from home, which requires his crossing street car tracks, is held, in *Chicago City R. Co. v. Tuohy* (Ill.), 58 L. R. A. 270, not to shew that he has sufficient capacity to be chargeable with contributory negligence in attempting to cross the tracks at another point after school hours.

*Will.*—Where a testator with three children bequeathes one-half his property to one of them, without mentioning the remainder of the property or the other children, it is held, in *O'Hearn v. O'Hearn* (Wis.), 58 L. R. A. 105, that no devise by implication arises, but that he dies intestate as to such remainder, and that the child named in the will is entitled to share in it with the others.

That witnesses to a will were in the same room with each other and the testator is held, in *Re Clafin's Will* (Vt.), 58 L. R. A. 261, not to be sufficient to make the attestation valid, if they were not so in the presence of one another that each could see the others sign.

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## BOOK REVIEWS.

**Nicolas on the Formation of Companies.**—The Law and Practice relating to the Formation of Companies (limited by shares) under the Companies Acts, 1862 to 1900, with an Appendix containing Registration Forms and Precedents of Memorandum and Articles of Association, by Vale Nicolas, of the Middle Temple, Barrister-at-law. London: Sweet and Maxwell, Limited: 1903. (7/6.)

The author states, clearly and concisely, the law and procedure in relation to the formation of a company from its inception until the time at which it becomes entitled to commence business.

An examination of the book shews that it is practical in character and will be useful to Canadian lawyers.

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**Mews's Annual Digest.**—The Annual Digest of all the Reported Decisions of the Superior Courts. Including a Selection from the Scottish and Irish, with a Collection of Cases Followed, Distinguished, Explained, Commented on, Overruled, or Questioned, and References to the Statutes Passed during the year 1902, by John Mews, Barrister-at-law. London: Sweet & Maxwell, Limited; Stevens & Sons, Limited: 1903.

The work of Mr. Mews is too well known to need commendation. The present issue is early and up to the usual standard.

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**The Alaska-Canada Boundary Dispute**, Under the Anglo-Russian Treaty of 1825; the Russian-American Alaska Treaty of 1867; and the Anglo-American Conventions of 1892, 1894, and 1897. An historical and legal review. By Thomas Hodgins, M.A., K.C. From the Contemporary Review. Second edition. Toronto: Wm. Tyrrell and Co.: William Briggs: 1903.

Mr. Hodgins has enlarged his recent article in the Contemporary Review and published it in pamphlet form. It is a vigorous and scholarly argument in support of Canada's claims, and the publication is timely in view of the recent appointment of a commission to settle the question.

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**The Empire Review.**—Edited by C. Kinloch Cooke. London: Macmillan and Co., Limited.

The January number contains, among others, an article on the Alaska-Yukon Boundary Dispute by Mr. F. C. Wade, K.C., of the Ontario, Manitoba, and Yukon Bars.



## CORRESPONDENCE.

**Local improvements under the Municipal Act.**

*To the Editor of the CANADIAN LAW TIMES.*

Sir,—Sections 678 and 680 of the Municipal Act have generally been construed to mean that where there is a special assessment for certain local improvements, sidewalks, for instance, and part only of the cost is assessed specially against the adjoining property, that property is then to be exempted from part of the general assessment levied for the remaining cost of such improvement and from the same proportion of any future general assessment for part of the cost of any sidewalk afterwards laid down on the same plan. For instance, if 60 per cent. of the cost of a certain sidewalk is to be assessed as a special rate against the adjoining property, that property is to be exempt from 60 per cent. of the general rate assessed for the remaining 40 per cent., and also if any other sidewalks are built afterwards, for which the adjoining property is assessed for *part* of the cost, the property adjoining the first built sidewalk is to be exempted from 60 per cent. of the general rate for that part of the cost of the second sidewalk which is to be paid for by the municipality. Of course, I am leaving out of account the crossings, etc., which are built wholly by the municipality and to which these provisions do not apply.

I think it can be shewn that this construction of the meaning of these clauses inevitably leads to inequality and injustice, and that if possible some other meaning should be given to them.

Suppose a small village divided into four portions of equal size and equally assessed, and that it costs \$10,000 to lay down sidewalks in each of the four districts, which we

may call A, B, C, and D. This will be irrespective of crossings, etc., which do not affect the question. Let the property immediately benefited pay 60 per cent. of the cost. If sidewalks are first built in A, this district pays in the first place \$6,000, and also one-quarter of 40 per cent. of \$4,000, in all, \$6,400; B, C, and D pay \$1,200 each. Then sidewalks are laid down in B; B pays \$6,000 of the cost and also one-quarter of 40 per cent. of \$4,000, that is, \$6,400 of the cost of its sidewalks in addition to its share of the cost of A's sidewalks, or in all \$7,600. A has added to its previous burden one-quarter of 40 per cent. of \$4,000, or \$400, making in all \$6,800. C and D have to divide \$3,200 of the second sidewalk between them, making altogether \$2,800 each.

Let sidewalks be built next in C. C then pays \$6,400 in addition to its previous \$2,800 or \$9,200 in all. A has \$400 added, making \$7,200 altogether. B adds the same, making \$8,000. D. has to add \$2,800 to its former tax, making in all \$5,600.

Thus A has sidewalks, and pays .....\$7,200

B has sidewalks, and pays ..... 8,000

C has sidewalks, and pays ..... 9,200

D has no sidewalks, and pays .... 5,600

Now, when D is to be built, there is provision for levying \$6,400 of the cost on D, which would make its sidewalks cost \$12,000, and for levying \$400 each on A, B, and C, but for the remaining \$2,400 there is no provision at all. Under this construction of the statute, it cannot be levied.

The glaring inequality between the burdens laid on A, B, and C, in the above example, might be remedied by a somewhat different construction, by exempting each district as its sidewalks are built, not only from 60 per cent. of the general rate for its own and future sidewalks, but also from 60 per cent. of the general rate for previous sidewalks. And this would appear to be more in accordance with the strict wording of the statute. In the above example, A, B, and C having sidewalks, would then each pay \$7,200, thus putting them on an equality, but D, which would have no sidewalks, would be assessed for \$8,400.

Of course where debentures are issued for the usual time, 20 years, to pay for these sidewalks, these results are modified to some small extent by the fact that at the end of twenty years exemption ceases in each case, and still more by the "single tax" amendment to s. 680, but these do not change the principle of inequality and injustice, though the actual amount is somewhat reduced. It may be remarked, too, that no manipulation of the percentages payable by different sidewalks can correct the inequalities.

As generally understood, and as is almost inevitable in practice, there is a fallacy in the idea that the cost of improvements should be divided in a certain proportion between the property immediately benefited and the *rest* of the municipality. It may be quite a proper division of the cost to lay down sidewalks in one-fourth part of the town and make that part pay 70 per cent. of the cost and the other three-fourths pay 30 per cent. But, if so, it would be certainly a very unjust division of the cost to lay down sidewalks in one-half of the town, make that half pay 70 per cent., and the rest pay 30 per cent.

The only way to avoid these absurdities is to construe the "whole municipality" to mean the "whole municipality," and if a certain street is to pay 60 per cent. of the cost of its sidewalks and the municipality the rest, to assess the street for the 60 per cent. specially and the whole municipality, including this street, for the remaining 40 per cent. Then the statement that a certain street pays 60 per cent. of the cost of its sidewalks would mean that the property in that street paid 60 per cent. of the cost of its sidewalks over and above the amount which other property equally assessed paid. In every case, then, debenture holders would have the property benefited as security for the proportion which it pays and the rest of the municipality for the balance.

The question remains, can the statute be reasonably construed in this way? That the usual construction leads to manifest injustice and absurdity is a strong reason for seeking some other interpretation of its words.

When s. 680 was first passed, improvements were paid for either wholly by the property benefited or wholly by the

municipality, and the intention of the clause about exemptions was to ensure that where a certain locality paid for its own improvements, it should not afterwards be called upon to contribute towards the cost of improvements in other localities built *wholly* at the expense of the municipality. Now, by confining the meaning of the words "general rate or assessment" in ss. 678 and 680 to its original meaning, that of rates or assessments for works built wholly at the expense of the municipality, we get rid of the absurdities and injustice necessarily inherent in the ordinary interpretation. Exemptions would then be confined to the one case, where improvements were made and no part of the cost assessed specially against the property immediately benefited. Even in this case inequalities are possible, but may be easily guarded against by municipal councils. Under the present ordinary interpretation of the law councils are helpless.

W. BURGESS.

Port Elgin.

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# THE CANADIAN LAW TIMES.

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APRIL, 1908.

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## THE CIVIL CODE OF THE PROVINCE OF QUEBEC.

(*Concluded.*)

### THE LAW AS TO MARRIED PERSONS.

#### *Married Women.*

UNLIKE the condition of married women under the Code Napoleon, the wife under the Code Civil is subject to numerous restrictions and incapacities.

She cannot appear in judicial proceedings without her husband or his authorization, even if she be a public trader or not common as to property; nor can she, when separate as to property, except in matters of simple administration. (Art. 176.)

Nor can she (except under similar restrictions) give, accept, alienate, or dispose of property *inter vivos*, nor contract or bind herself or become a trader. (Art. 177.)

Where, however, she is separate as to property, she may do and make alone all acts and contracts connected with the administration of her property. Where she is a public trader, to become which she requires the authorization express or implied of her husband, she may without any such authorization enter into all agreements relating to her business. (Art. 179.)

The want of an authorization, where one is required, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so. (Art. 183.)

The wife may, however, make a will without the authorization of her husband. (Art. 184.)

The reason for imposing this general incapacity upon married women is explained as follows:—

L'incapacité de la femme mariée est fondée sur la suprématie du mari. En se mariant la femme perd l'exercice de ses droits civils, excepté lorsqu'elle est séparée de biens ou marchande publique.

La voie du Palais de Justice lui est interdite, sauf le cas où, séparée de biens, elle peut ester seule en justice pour des intérêts de simple administration. (176 C. C.)

La véritable raison de l'inégalité conjugale, ce n'est donc pas la faiblesse de la femme, mais bien plutôt parceque la loi croit qu'il est de l'intérêt d'une association qu'il n'y ait qu'un chef, et de la dignité humaine que le commandement repose dans les mains du mari.

Chez nous le mari quoique mineur peut en tous cas autoriser sa femme majeure. (1 Rev. Leg. 158, Incapacité de la Femme Mariée. Cf. 2 Rev. Leg. 322.)

Provision is made, however, against the case of an arbitrary or unreasonable withholding of this authorization by the husband. If he refuse to authorize the wife to appear in judicial proceedings or to make a deed, or if he be interdicted or absent, the necessary permission may be given by a Judge. (Arts. 178 and 180. Cf. also Art. 1424 and 2 Rev. Leg. 403.)

### *Community.*

This special and complicated rule of law prevails in the Province of Quebec and also in the State of Louisiana, the sources of the law of which State are somewhat the same as those of Quebec law.

In the States of Arizona, California, Idaho, Nevada, New Mexico, Texas, and Washington, a community of acquests and gains, somewhat analogous to the true community, is to be found.

This is fully dealt with in an article on the subject in volume VI. of the valuable American and English Encyclopædia of Law.

In this article it is said that the origin of the doctrine of acquests and gains is shrouded in obscurity.

The best opinion is that it was unknown to the Roman law, and that it took its rise with the Germans, among whom at an early period of their history, the wife was entitled to one-third of all the gains made during coverture. The real or presumed thrift and industry of the wife, it has been said, very likely occasioned this legislation, and in an early state of society the facts most probably warranted such a rule.

But it has always been considered by the best French authorities that their system of community of property is entirely of home growth and took its rise in those parts of France known as the Pays du Droit Coutumier.

Fuzier-Herman, in his *Repertoire*, discussing the origin of French community, says that it took its rise neither from the Romans nor the Germans, but in France. Laurent also says (*Principles de Droit Civil*, vol. 21, sec. 147): "*Le régime dotal est romain, la communauté est coutumière. Mais sous quelles influences s'est développée la communauté dans les pays de coutumes? Est-elle germanique? est-elle gauloise ou celtique? L'histoire ne donne pas de réponse à ces questions.*" And (sec. 148): "*On peut donc dire que la communauté est le droit national de la France.*"

I can only attempt to deal very briefly with some of the leading features of this peculiar system.

A valid marriage is essential to community of matrimonial gains.

In the Province of Quebec, in the absence of agreement to the contrary, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country and particularly to the legal community of property. (C. C. Art. 1260.)

From the moment of the celebration of marriage this presumed agreement becomes irrevocably the law between the parties, and can no longer be revoked or altered.

This is "legal community."

This community of property may, however, be excluded, or altered, or modified at pleasure by the marriage contract, and is then called "conventional community."

This is said to be very rare now-a-days in the Province of Quebec. If there is a marriage contract, it generally contains

a stipulation for separation as to property. There are practically only two matrimonial regimes, of community and of separation as to property, whether contractual or judicial.

Where "legal community" exists it may in certain cases be interfered with by judicial decisions, and a "*séparation des biens*" may be granted.

In the community there are three parties, the husband, the wife, and the community.

The French commentators differ as to whether the community is to be considered an "*être morale*" or not. Most of the best known authorities take the negative view. Laurent puts the matter very clearly thus:

*La communauté n'est pas une personne civile qui possède, qui est créancière ou débitrice; ce sont les époux qui mettent une partie de leurs biens en commun et qui, à raison de cette société, deviennent créanciers ou débiteurs en qui concerne le patrimoine qui leur reste propre.*" (Vol. 21, sec. 189.)

Certain classes of property remain the property of the husband and wife respectively, and do not fall into the community.

The assets of the community consist:

(1) Of all the movable property which the consorts possess on the day when the marriage is solemnized, and also of all the movable property which they acquire during marriage, or which may fall to them during that period by succession or by gift, if the donor or testator have not otherwise provided.

(2) Of all the fruits, revenues, interests, and arrears of every kind, which fall due and are received during marriage, and arise from property belonging to the consorts at the time of their marriage or from property which has accrued to them during marriage by any title whatever.

(3) Of all the immovables they acquire during the marriage. (Art. 1272.)

The immovables which they possess on the day of the marriage, or which fall to them during its continuance, by succession or an equivalent title, do not enter into the community; nor do gifts by marriage contract. (Art. 1275.)



All damages recoverable for injury to the person, reputation, or credit of either spouse fall into the community. But if the husband joins with another in the commission of a tort upon the wife, then the cause of action belongs to the separate estate of the aggrieved consort, although, of course, the marital relation precludes a recovery against the offending member of the community.

The right of action for damages for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband.

Under the *régime de la communauté* the right of action belongs to the husband as *chef de la communauté*, and can be exercised by him alone. (*McFarran v. Montreal Park and Island R. W. Co.*, 30 S. C. R. 410.)

The plaintiffs, husband and wife, common as to property, brought an action claiming damages for bodily injuries suffered by the wife in consequence of a fall. A demurrer on the ground that the wife had improperly been made a party to the suit, the right of action belonging to the husband alone as head of the community, was sustained. (*Troude v. Meldrum*, Q. R. 20 S. C. 531.)

The husband is head and master of the community, his dominion and power of disposition being subject to but a single limitation, namely, that he shall not alienate with intent to defraud the wife. He may bestow it upon charity, or even squander it on unworthy objects, or in the gratification of extravagant tastes or luxurious indulgences. (Art. 1292.)

He is the sole managing partner, and may alienate all community property by gift or otherwise *inter vivos* without the consent of the wife.

Such being the character of the husband's right and interest, the question would naturally arise, What is there left for the wife? She has during coverture no vested proprietary interest in the community, nor any voice in the management of its affairs, but only an inchoate right or expectancy. Her status has been compared to that of an heir with reference to the property of his ancestor.

Her interest is merely a "potential" one; if the husband dies before disposing of the community property, the wife becomes absolutely entitled to one-half thereof; this right cannot be defeated by the will of the husband. (Arts. 1293, 1361.)

It must be observed, however, that one very substantial right of the wife during the community is that she may apply for separation as to property for good cause, and that from this point of view her interest is not entirely of a "potential" character.

This community can only be dissolved during the lifetime of the spouses by civil death or by a judicial separation; they cannot effect it by any voluntary act. The only ground for the judicial "*séparation de biens*" is when the wife's interests are in danger, and there is reason to fear, owing to the disordered state of the husband's affairs, that his property will not be sufficient to satisfy what the wife has a right to recover or get back. (Art. 1311.)

The right to claim it is a personal one of the wife's, and cannot be demanded by her creditors, even with her consent. (Art. 1315.)

The effect of a *séparation de biens* is to give to the wife the uncontrolled disposal of her property, absolutely as far as movables are concerned, but as to immovables not without the consent of the husband, or, upon his refusal, without being judicially authorized. (Art. 1318.)

But a wife, *séparée de biens*, must contribute in proportion to her means and to those of her husband, to the expenses of the household as well as to those of the education of their common children; these expenses she must bear alone, if the husband is without means.

The disadvantages of the system of community are so many, and the system itself so complicated, that marriage contracts stipulating for separation as to property are becoming almost universal in the Province; and even in the case of persons who possess little or no property, it is usual for that reason to have contracts providing that the consorts shall not be subject to the regime of community of property.

The recent cases in England of *DeNicols v. Curlier*, [1900] A. C. 21, and *In re DeNicols*, [1900] 2 Ch. 410, emphasize the importance of this. In these cases two French people were married in Paris, without any special contract, and, therefore, their proprietary relations were governed by the Code Napoleon. They were poor at the time of marriage. They afterwards removed to England. When the husband died, he left an estate valued at \$3.-500,000. His widow survived him, and not being satisfied with the provisions made for her by his will, brought these actions to have her rights declared as to both personalty and realty left by her husband. The Courts decided that the rights of the married pair in each other's property were not affected by the change of domicile from France to England, that the Code rule as to community followed them, and that the widow was entitled to one-half the property, whether real or personal.

The same principle will, of course, apply to the cases of persons who, being domiciled in the Province of Quebec, marry there without a special contract and afterwards remove to another Province, and die there.

*Suretyship.*

"A wife cannot bind (s'obliger) herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect." (Art. 1301. See 2 Rev. Leg. 321.)

The origin of this article is generally, and apparently correctly, ascribed to the Velleian senatus consultum of the Roman law, adopted in the reign of the Emperor Claudius.

The design of this law was the protection of all women from incurring obligations on behalf of other persons, no distinction being made between maid, wife, or widow; *propter sexus imbecillitatem*.

Before the conquest of Canada this Velleian law had been abolished in France, and was not therefore in force in Canada.

In the year 1841, however, it was reintroduced by the Parliament of Canada (4 V. c. 30, s. 36), and has been em-

bodied in the Code Civil, though it is not found in the Code Napoleon; limited in Quebec, however, to the case of married women. Wide as the language of the Code Civil appears, it is in practice limited to an obligation by way of suretyship of a wife with or for her husband, and does not prevent her from paying, or making sacrifices of her property for the purpose of paying, the debts of her husband.

"There is nothing in the law to prevent her from paying the debts of her husband and from disposing of her property to do so." (*Bank of Toronto v. Perkins* (1881), 1 Q. B. R. 357.)

"The result is now familiar to the profession, that a payment made by the wife is perfectly lawful. Wherever the rule of the Roman law prevailed, she could renounce; she could pay; but she could not engage or bind herself." (*Gorrie v. Ogilvie* (1881), 5 L. N. 261. See also *Hamel v. Parent* (1876), 11 App. Cas. 121.)

It should be observed that the Code forbids an obligation "with" as well as an obligation "for" the husband, and examples of the former are not unknown. The case of *Leclerc v. Ouimet* (19 Rev. Leg. p. 78) furnishes an instance. There the husband and wife were joint indorsers of a note in which neither was interested, and the obligation of the wife was held to be null.

It may be asked why prevent a wife from running the risk of losing her means in the future, while she is free to dispose of all in the present.

The reason is well put by Mr. Justice Meredith in the case of *Dame Baudria et vir v. McLean* (6 L. C. Jur. 65), in giving judgment in the Court of Appeal: "To me the intention of the Legislature seems as plain as it is reasonable. We all know the dangerous consequences of the contract of suretyship. And a wife when asked to become the surety of her husband is placed in a position of peculiar difficulty. How can she doubt the honesty of her husband? And she is only too ready to believe the assurance that when the debt matures, there will be ample means to meet it without troubling her."

"I have no doubt that there are some, if not many, women who would have sufficient determination to refuse to alienate

their own property, and who might yet be induced to become security for the debts of their husband; indeed, I think there are not a few husbands who would be glad to extend their credit by the use of the names of their wives, and who yet would not ask their wives to bind themselves or their property in a more direct manner. The object of the Ordinance seems to me to have been to guard married women against the danger to which I have referred.

“That law has, therefore, declared in effect that married women shall not become ‘security or incur any liabilities otherwise than as commune en biens for debts or obligations’ entered into by their husbands; leaving at the same time the rights and powers of married women in other respects unimpaired.

“Facilius se obligat mulier quam alicui donat.”

“The law declares that all contracts entered into by the wife, as surety in any way for the debts of her husband, are absolutely null and void: any contract, therefore, which she may so attempt to make, although disguised under a different name and made to appear as an obligation for an individual debt of her own, is in fraud and violation of the law.” (*Mercille v. Fournier*, 7 R. J. R. 9.) Even though the wife herself represented to the lender that the money was for herself, it does not estop her from proving the truth, and thereby evading liability: (*Rhéaume v. Caille* (1878), 1 L. N. 340.)

This is on the ground of public policy.

But the wife is not incapacitated from entering into obligations together with her husband, so long as they are for her own business or her sole benefit, either in the ordinary course of a business in which husband and wife are jointly interested, or where money is directly advanced to the wife, in which case the husband joining in the obligation is virtually security of the wife.

There is nothing, therefore, in Art. 1301 to prevent the wife who has been duly authorized (either by her husband or judicially), from entering into obligations for her own business, even jointly and “solidairement” with her husband.

There has been much difference of judicial opinion as to how far a defence under this article is available where the

action is brought against the wife by a third person who has acted in good faith, for valuable consideration, and in ignorance of the real facts as to the character of the wife's obligation.

It may probably now be said that the rule is an absolute one even in such a case. (*Dame H. Ricard v. La Banque Nationale* (1893), Q. R. 3 Q. B. 161.)

Such a transaction, being "une fraude à la loi et à l'ordre public," is an absolute and radical nullity.

It is apparent from the above that a person having business transactions with a married woman in the Province of Quebec must look well to his steps. If the husband does not join in the transaction, the obligation of the wife may be void for want of authorization. If he does join in the transaction, it may be equally void as being "contrary to public policy." To the legal maxim "caveat emptor" it would be well to add, in the Province of Quebec, the words "et qui cum muliere contrahit."

Strange to say, no precautions are necessary when dealing with spinsters and widows, the law having apparently unbounded confidence in their ability to protect themselves.

### *Maintenance.*

Marriage involves not merely the ordinary obligation upon the husband and wife to maintain and bring up their children (Art. 165), but children are bound to maintain their father, mother, and other ascendants, who are in want.

Sons-in-law and daughters-in-law are also obliged in like circumstances to maintain their father-in-law and mother-in-law and vice versâ. (Arts. 166, 167.)

*Note*, this last obligation ceases when the consort through whom the affinity existed and all the children issue of the marriage are dead. (Art. 167 (2).)

See for a recent instance of the law enforced by a married woman against her father-in-law, *Gallagher v. McEnroe*, Q. R. 17 S. C. 294.

Mothers-in-law stand in an advantageous position in the Province of Quebec, as will be seen by the following example.

The plaintiff brought an action for support against her son-in-law, who pleaded as a defence that the conduct of the plaintiff left much to be desired, and that she was a source of scandal to her minor children, over whom she did not exercise sufficient surveillance, of which instances were given. The Court overruled this plea with costs. (*Poissant v. Racette*, Q. R. 14 S. C. 441.)

When the mother-in-law contracts a second marriage, the obligation to maintain her ceases. (Art. 167.)

An interesting case was recently decided by the Superior Court. (*Barnes v. Brown*, Q. R. 7 S. C. 287.) The facts were these. A young woman married in the city of New York and came with her husband to Montreal, where, after remaining for some time, he abandoned her. She took an action for an alimentary allowance against her father-in-law, the writ being served upon him in Montreal during a temporary visit. The action was, however, dismissed on the ground that the obligation to furnish aliment being an obligation arising from the operation of law solely, a person such as the defendant, who was not subject to that law, and by the law of whose domicile, which was also the place of the marriage of the plaintiff to his son, no obligation is imposed upon a father-in-law to maintain or contribute to the support of children-in-law, could not be held liable when he ceased to be within the Province.

#### *Evidence.*

Married persons are as a general rule incapable of testifying for or against each other. (Code of Procedure, Art. 314.)

This rule, drawn from the Roman law (*domestici testimonii fides reprobatur*), is to be found also in the present French Code.

It is supposed to be based on principles of public policy, in order to prevent the danger of perjury from the use of marital influence were the wife allowed to testify on behalf of the husband, and in order to preserve family secrets, and to encourage mutual confidence between husband and wife.

“Placée ainse entre son mari et sa conscience, celle-ci fléchira, et le parjure devient un fait accompli.”

"This rule," says Greenleaf (16th ed., vol. 1, s. 334), "is founded partly on the identity of their legal rights and interests; and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life that confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent, and to break down or impair the great principles which protect the sanctities of the relation would be to destroy the best solace of human existence."

To this general rule as between husband and wife there is one exception.

When they are separated as to property and the one has acted as agent for the other in administering the goods of the other, then the agent may be examined as a witness in regard to the matter of the administration, if the Court before which the matter is pending shall think proper to allow it. (See 2 Rev. Leg. 390; 6 Rev. Leg. 1.)

In Ontario, in civil matters, there is no incompetency to testify by reason of crime or interest; parties to actions, and the husbands and wives of such parties, are competent and compellable to give evidence.

No consort, however, can be compelled to disclose any communication made by the other during the marriage; this privilege extends to all communications, not merely to those which are confidential. (R. S. O. c. 73, ss. 4, 8.)

In criminal matters the protection of married persons is carried somewhat further; consorts are not merely, as in civil matters, not compellable to disclose any communication made to each other during marriage, but are not competent to make such disclosure. (R. S. C. c. 56, s. 4.)

#### WILLS.

The commissioners who prepared the draft Civil Code, from which the present Code is derived, say in their report (p. 171) that they "are fain to believe that by means of amendments, which are few in number, they have approximated the main features of these forms (that is French and English forms) in such a manner as to offer upon the subject a distinctly Canadian law, which does not essentially depart from either one or other of its sources."



There are three methods in which a will may be validly made in the Province of Quebec:

- (a) In notarial or authentic form;
- (b) In writing and in presence of two witnesses, in the form derived from the laws of England;
- (c) In the form required for holograph wills. (C. C., Art. 842.)

While the formalities prescribed by the Code for making a will "must be observed on pain of nullity," yet it is provided that wills purporting to be made in one form, which are void in consequence of the inobservance of some formalities, may be valid as made in another form, if they contain all the requisites of the latter. (Art. 855.)

(a) *Notarial.*

Wills in notarial or authentic form are received before two notaries, or before a notary and two witnesses.

The testator, in their presence and with them, signs the will or declares that he cannot do so, after it has been read to him by one of the notaries in presence of the other, or by the notary in the presence of the witnesses. (Art. 843.)

By the Code (Art. 856) no letters probate of an authentic will are required, the original remains with the notary, and the originals and legally certified copies of wills made in such form make proof in the same manner as other authentic writings (Art. 856), "i.e., they are authentic and make proof of their contents without any evidence of the signature or seal appended to them, or of the official character of the officer."

But the executor named in such a will was held in Ontario not to be entitled to ancillary probate under a statute providing that where "any probate or letters of administration, or other legal document purporting to be of the same nature, granted by a Court of competent jurisdiction in any Province" is produced to the registrar of any Surrogate Court in Ontario, ancillary probate shall be granted.

The Court held that, although the executor might not be "obliged to produce the will before any Court for probate as authority to act under it, he would necessarily have to prove the testator's death in any proceeding he might have to bring

under it, and that the will had not been revoked," and that consequently such a document is "far from being the equivalent of letters probate or letters of administration which import death leaving an unrevoked will or death intestate." (In re Maclaren, 22 A. R. (b) English Form, 18.)

(b) *English Form.*

Wills made in the form derived from the laws of England must be in writing and signed at the end with the signature or mark of the testator in presence of two competent witnesses together, who attest and sign the will immediately in presence of the testator and at his request. (Art, 851).

(c) *Holograph Will.*

The holograph will is one which is entirely written, dated, and signed by the testator, and was recognized by Roman law.

By the policy which now prevails throughout England, Canada (except Quebec and Manitoba), and most parts of the United States, holograph wills stand on no privileged footing, but require to be attested like other instruments.

The law of Quebec and Manitoba differs from that of the other Provinces of the Dominion in recognizing a will in this form, as is done by the law of Louisiana and some other States.

The Code, Art. 850, provides that "holograph wills must be wholly written and signed by the testator, and require neither notaries nor witnesses. They are subject to no particular form."

The essentials of a holograph will were discussed in the case of *Reeves v. Cameron* (Q. R. 2 Q. B. 232), decided by the Court of Appeal, which reversed the judgment of the Superior Court. The facts were these:—

In 1875 Madme. Metzler brought from Ottawa one of her nephews, John J. Reeves, who lived with her and took care of her until her death in 1878. In 1868 she made a will before notaries in favour of J. J. Reeves and two other nephews. After her death J. J. Reeves produced and proved a holograph will, a writing, without date, in these terms:—

"I give to my nephew John J. Reeves all that I possess for having taken care of me."

(Signed) "M. E. V. R. Metzler."

In his deposition for the purpose of proving the will, J. J. Reeves swore that all this writing was in the hand of the testatrix. It was proved nevertheless that the words "John J. Reeves" were in another hand.

The will was sustained in the Superior Court but was set aside in the Court of Appeal (two Judges, however, dissenting) on the ground that the addition of these words nullified the whole will. "Comme ce testament n'est pas écrit en entier de la main de la testatrice, je crois qu'il doit être déclaré nul."

The whole case is interesting in view of the divergence of views of the Judges and the very full discussion as to what is essential to the validity of a holograph will.

#### *Revocation.*

By the law of England marriage has the effect of completely revoking a will previously made, as to both real and personal estate; no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, will prevent the revocation. (Jarm. I. 128.)

By the law of Ontario, while as a general rule a will is revoked by a subsequent marriage, this effect is not now produced where it is declared in the will that the same is made in contemplation of such marriage, or where the surviving consort elects to take under the will by an instrument in writing signed by such consort and filed within one year after the decease of the testator in the proper office. (R. S. O. c. 128, s. 20.)

The law of Quebec does not recognize marriage as a ground of revocation. No will can be revoked by the testator except by some distinct act such as a subsequent will revoking the former one, or by some notarial or other written act, or by means of the destruction, tearing, or erasure with the intention of revoking it, or by alienation of the thing bequeathed. (Art. 892.)

*Heirs.*

The word "heir" in the case of testamentary succession has by the law of Quebec a distinct technical meaning which differs from that of the English law and even of the French modern law.

Under the civil code of that Province it is, when there is a will, the person to whom the testamentary succession devolves, the universal legatee, if the testator has appointed one, that is called the heir, and is, in law, the only heir of the deceased.

This is clearly held in the recent case of *Allan v. Evans*, 30 S. C. R. 416.

One R. A., who died in Montreal in 1896, had by his will, made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate.

M. A. died in 1895, leaving a will appointing five of her children her universal legatees. R. A. subsequently perused a copy of ("took communication of") the will of the deceased M. A. and made a codicil to his own will as follows:—

"With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A. . . . my will and desire is that her said share of said residue shall go to her heirs."

The Court held that this meant the universal legatees under the will of M. A., that they, and they alone, are in law the heirs of M. A.; that it cannot be said that one who does not and cannot inherit is an heir, though, but for a will, he would have been one; that he is disinherited, the testator having taken away from him, as he had the right to do, the very name of heir that he otherwise would have been entitled to; and that in the Province of Quebec the universal legatee is now the heir, and the only heir, a testamentary heredity excluding the legitimate heredity.

In reply to the argument that in ordinary language the word "heir" means "heir-at-law," the judgment says: "No doubt that is so in England, and also in France, where the old rules of the *droit coutumier* on the subject have been in a great measure incorporated in the Code Napoleon. In the

Province of Quebec, likewise, when speaking of an intestate succession, the word "heir" has that same meaning. But when speaking of the succession of anyone who has bequeathed his estate to a universal legatee, the word "heir" in plain language means that legatee, the person made heir by the will of the testator."

But it may be noticed that neither in ordinary language nor in the language commonly used in legal documents, nor indeed in the Code itself, is the definition given by Art. 597 of the Code invariably followed, and it is not perhaps strictly correct to confine the meaning of the word "heir" within that definition. The Code itself commonly uses the word "legatee" to designate a person taking under a will. This is in fact the ordinary expression. (C. C., vide Arts. 873, 874, 863, et seq.)

The definition of Art. 597 appears to be one of those general definitions which do not correspond with actual usage.

#### *Conditional Gifts.*

Gifts inter vivos or by will may be conditional. An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift inter vivos depends, is void, and renders void the disposition itself, as in other contracts. In a will, such a disposition is considered as not written and does not annul the disposition. (Art. 760.)

The construction of this article has given rise to an interesting discussion as to the difference between the law of England and that of Quebec in regard to conditions imposing a disability upon recipients of benefits under wills by reason of their religion.

Two cases in English Courts may be profitably noticed in the first place:—

(1) *Hodgson v. Halford*, 11 Ch. D. 959.

A testatrix by will limited to her daughter an exclusive power of appointment by will amongst her children.

This daughter by her will, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters interests only, and declared that if, either during her life or after her death, any

son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund, and the forfeited share should go over to others of the children.

The Court held that the forfeiture clause was not void as against public policy, and that there was no reason for holding "that a parent or appointor disposing by will either of his own property or any property over which he has a power of appointment, is not perfectly justified in making a provision in favour of such of his children as shall not embrace a particular faith—Christian, Roman Catholic, Mohammedan, or any other."

(2) *Wainwright v. Miller*, [1897] 2 Ch. 255 — another case of the exercise of power of appointment by which a portion of a fund was given by the appointor upon trust to pay the income to H., if not then a member of the Roman Catholic Church or of any sisterhood, or until she should become a member of either.

. After the death of the appointor, H. became a member of a sisterhood. It was held that it was not a fraud on the power to appoint in that form.

Contrast with these the following Quebec cases:—

(1) *Kimpton v. Kimpton*, 16 Rev. Leg, 361. It was there held that a provision in a will that certain benefits thereunder should not be received by anyone professing the Protestant religion, came under the provisions of Art. 760, C. C., and was void as being a restraint upon liberty of conscience and as opposed to good morals, and contrary to law and public order.

(2) *Renaud v. Lamothe*, 20 C. L. T. Occ. N. 443. A clause in the will in question provided that if any of the sons of the testator should marry otherwise than according to the rites of the Roman Catholic Church, the issue of such marriage should be excluded from the succession, as should also any of the grandchildren who were not brought up and instructed in that faith.

One of the sons married contrary to this provision, and his son, the plaintiff in this action, was not brought up in the Roman Catholic faith. He now claimed to recover from the executors certain revenue which, it was admitted, was due him but for the above clause.

His contention was that that clause imposed a condition which was both illegal and contrary to public order and policy, being in restraint of the free exercise of religion.

It was held by Taschereau, J., declining to follow *Hodgson v. Halford* as not applicable to the Province of Quebec, that the condition was void, being in restraint of religious liberty, and therefore contrary to public policy.

But this decision has been reversed by the Court of King's Bench, whose decision has been affirmed in the Supreme Court, 32 S. C. R. 357.

It has in these decisions been held that in the Province of Quebec, the English law rules on the subject of testamentary dispositions, and that the above condition imposed by the testator was valid.

#### *Executors.*

If there are no testamentary executors, and no provision made in the will for their appointment, the execution of the will devolves entirely upon the heir or the legatee who receives the succession. (Art. 905.)

In connection with wills and successions, it is important to notice some peculiarities of the laws of the Province of Quebec with respect to:

- (1) The effect of probate.
- (2) Letters of administration.
- (3) The position and powers of executors.

#### (1) *Probate.*

Probate, required in the case of holograph wills and wills made in English form, is a purely *ex parte* proceeding, and its effect is simply to give the character of authenticity to the certified copies which are issued from the office of the Court.

In the case of *Migneault v. Malo*, L. R. 4 P. C. 123, it was held, that "the granting of probate (in the Province

of Quebec) is not of that binding and conclusive character which attaches to it in England, where a probate granted in solemn form after due citation of parties would operate "as a judgment in rem or a judgment inter partes," and does not prevent the heirs from impugning the validity of a will in their defence to an action brought by a legatee under the will.

And in a recent case decided by Mr. Justice Tait in the Superior Court, *St. George's Society v. Nichols*, Q. R. 5 S. C. 274, it was held that the admission of a will to probate does not create any presumption in its favour when it is contested, by reason of the provision contained in Art. 858.

### (2) *Letters of Administration.*

The entire absence of letters of administration is peculiar to the law of the Province of Quebec. Neither in case of intestate nor in testamentary succession is the granting of letters of administration or any similar procedure recognized. The old French maxim "*Le mort saisit le vif*" obtains in full force in the Province of Quebec. The heirs-at-law, if there is no will, are seized of the succession by the law alone (Civil Code, Art. 607); legatees are seized by the operation of the will (Art. 891); and executors are seized in the same manner (Art. 918.) The only case in which the intervention of the Court is necessary is when there are no heirs-at-law and the succession is claimed either by the surviving consort (who has no rights of heirship under Quebec law) or the Crown, in which case application may be made for what is technically called "*Envoi en Possession*" (Art. 607.)

### (3) *Executors.*

The position of an executor under the law of the Province of Quebec differs in some important respects from that of an executor under English law. The testator may in his will give him what powers he pleases, but, in the absence of such extended powers being granted, he can do very little without the consent of the heir or legatee who receives the succession.

The following points may be noted:

The executor need not be sworn or give security. (Art. 910.)



If there are several executors, all must act together. (Art. 913.)

The executor must render an account of his administration to the heir or legatee. (Art. 918.) He can not even pay the debts and legacies or sell movable property for that purpose without the consent of the heir or legatee, or, in default thereof, judicial authorization. (Art. 919.)

An executor's powers do not pass to his heirs or other successors. (Art. 920.)

In view of the very limited powers which executors possess, a testator usually avails himself of the provision of Arts. 916 and 921 and extends the powers of his executor much beyond the limits allowed him by the Code, and may free him altogether from the control of the heir both in regard to accounting and alienation of the property; otherwise the executor is little more than the attorney (with very restricted powers) of the heir or legatee.

#### OFFENCES OR ACTIONABLE WRONGS.

There is a striking difference between the rules of the civil law and those of the common law of England in regard to offences or actionable wrongs.

This is owing to the fact that the Code in Arts. 1053 and 1054 lays down a broad rule or principle which is applicable to all cases of this kind.

Art. 1053—"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill."

Art. 1054—"He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care.

The father, or, after his decease, the mother, is responsible for the damage caused by their minor children.

Tutors are responsible in like manner for their pupils.

Curators or others having the legal custody of insane persons, for the damage done by the latter.

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

Applying the principle laid down in these Articles to every case that comes up for decision, the solution will depend upon the answer to be given to two questions: (1) Was there a fault on the part of the defendant; (2) Were the damages proved wholly or partly the result of that fault.

Having before them this broad principle, some of the best known and most firmly settled doctrines of the common law have never been recognized or adopted in the Courts of the Province of Quebec.

I will now consider some instances of this.

#### *Master and Servant.*

Apart from the effect of the Employers' Liability Acts, no doctrine is more firmly settled in English law than that of common employment, the rule being that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service.

No such doctrine appears to exist in the law of any other country in Europe. (Pollock, p. 89.)

"A servant when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both." (Erle, C. J., in *Tunney v. Midland R. W. Co.*, L. R. 1 C. P. p. 296.)

The same doctrine has been laid down in the American leading case of *Farwell v. Boston R. W. Co.*, 4 Met. 49.

This rule of English law has not adopted in the Quebec Courts.

"The doctrine of common employment has no place in the law of Quebec." (Sir Henry Strong, C.J., *The Queen v. Fillion*, 24 S. C. R. 482.)

According to the French law common employment is no defence, and does not exonerate the employer from liability for the negligence of a servant who may by his negligence have caused an accident from which another servant has suffered." (*Asbestos Company v. Durand*, 30 S. C. R. 292.)

The doctrine of the law of the Province of Quebec upon this point has been very forcibly put by the late Judge Ramsay in the case of *Robinson v. Canadian Pacific R. W. Co.*, M. L. R. 2 Q. B. 25:—

"It seems to be well settled in this country that the employer is liable for the want of skill of a fellow-servant. We assimilate the want of skill of a fellow-workman to defective plant. (1054, C. C.) It is evident that the employer is not a garant for the wilful wrong-doing of his servant, but why he should not be liable for his negligence in the performance of the duties he is set to do because his victim is a fellow-servant baffles all reason to explain."

It may be noted that before the Code the doctrine of common employment obtained some recognition in the Quebec Courts. See *Fuller v. Grand Trunk R. W. Co.*, 1 L. C. Jur. 68; *Bourdeau v. Grand Trunk R. W. Co.*, 2 L. C. Jur. 186; but it is difficult to see how such a doctrine can ever be recognized while Art. 1054 remains in its present form.

### *Escape of Dangerous Things.*

"If the bringing the dangerous thing upon the occupant's land be effected, under sanction of legislative authority, the fact that it results in damage to the party's neighbour by purely natural escape or by authorized channels, and not by reason of negligence attributable to the occupant, will not render the occupant liable." (*Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 679.)

This well settled rule of English law was invoked in an action against the Canadian Pacific Company for damages by fire. (*Roy v. Canadian Pacific R. W. Co.*, Q. R. 9 Q. B. 551.)

The trial Judge held that the fire was caused either by sparks from the engine or originated in some way from the

train—he did not determine which—and that this created a presumption of negligence which the defendants had not rebutted.

On appeal the defendants contended that their use of engines being in the exercise of a statutory right, it devolved upon the plaintiff to prove affirmatively that the appellants had been guilty of negligence, either by using a defective engine or by shewing carelessness or a want of skill in its management. But the Court held that the French law, and consequently the law in the Province of Quebec, is that the railway company are responsible, notwithstanding the adoption of every means of precaution known to science, and that the English authorities are not binding in a case pertaining to civil rights and liberties.

In an earlier case (1889) of *Leonard v. Canadian Pacific R. W. Co.* (15 Q. L. R. 93), Mr. Justice Andrews used the following words: "If it be admitted that the defendants have used the best and safest engines obtainable, I think they are nevertheless liable, on the same principle on which anyone exercising a calling dangerous to his neighbours would be condemned to repair any damage he might thereby cause, even though his calling were lawful, and he had used his best endeavours to render it harmless."

The learned author of "*The Railway Law of Canada*" (Professor Abbott, K.C.) sums up what he conceives to be "the true doctrine which should be adopted in such cases, that the railway company's liability must depend upon the presence or absence of negligence in the operation of the railway; they being held to the strictest possible diligence, consistent with the practical operation of the railway in the exercise of their statutory powers; and that so long as these powers are exercised without negligence, and with all due and proper precautions, the company should not be held liable"—p. 417. And this view seems to be sustained by the judgment of the Judicial Committee in the appeal in the *Roy* case (*Canadian Pacific R. W. Co. v. Roy*, [1902] A. C. 220, 1 Can. Ry. Cas. 196), where it was held that a railway company authorized by statute to carry on its undertaking in the place and by the means adopted, is not responsible for damages for injury not

caused by negligence, but by the ordinary and normal use of its railway, and that Art. 356 of the Code does not on its true construction contemplate the liability of a railway company acting within its statutory powers.

*Malicious Prosecution.*

"In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution." (Per Bowen, L.J., *Quartz Hill Mining Co. v. Eyre*, 11 Q. B. D. 674, p. 690.)

The reasons generally given for this rule are: There are three sorts of damage any one of which will support an action for malicious prosecution, namely, (1) damage to a man's fame, as if the matter whereof he is accused be scandalous; (2) damage done to the person, as where a man is put in danger to lose his life or limb, or liberty; (3) the third sort of damage which will support such an action is damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. (*Saville v. Roberts*, 1 Raym. 374.)

Now the bringing of an ordinary action maliciously and without reasonable or probable cause does not necessarily involve any one of these three heads of damage so as to enable the defendant to bring a subsequent action against the plaintiff.

At the trial his fame will be cleared, if he deserves to be; the bringing of the action involves no injury to his person; nor, thirdly, is there necessarily any damage to his property, as if he succeeds he will be awarded the costs of the action, if he deserves them. Sir Frederick Pollock has pointed out that the third reason by which the costs awarded in an action are a sufficient solatium for injury to the pocket is an amiable fiction; he assigns as a more logical reason for the rule, the necessity *ut sit finis litium*.

There are exceptions to this general rule of a limited character, which need not be specified here.

But in the Province of Quebec no such rule is recognized. In the case of *Montreal Street R. W. Co. v. Rit-*

chie, 16 S. C. R. 625. Mr. Justice Strong states that "by the law of the Province of Quebec an action can be maintained by a defendant, who has succeeded in a civil action, against one who maliciously and without reasonable and probable cause, or, in other words, against one who having no real interest has, in bad faith and with the malicious intention of harassing his adversary, unsuccessfully prosecuted the action.

"The law of the Province of Quebec in this respect differs from the law of England, according to which such an action will not lie, unless there has been by means of civil process some unwarrantable interference with the person or property of the party defendant in the original action." (pp. 629-630.)

### *Contributory Negligence.*

Another well known and well settled common law doctrine is not altogether in harmony with Arts. 1053-4 of the Civil Code, and is therefore not recognized in the Province of Quebec, that of contributory negligence, according to which a plaintiff cannot recover damages if but for his own negligence or that of the person who represents him, the accident would not have happened. In the Province of Quebec contributory negligence may or may not be a bar to recovery according to the facts proved.

In the case of *Cardieux v. Canadian Pacific R. W. Co.*, M. L. R. 3 Q. B. p. 315, the late Chief Justice Dorion said: "I am of opinion that when the two parties are in fault the damages should be divided between them. . . . Nevertheless this rule has never been adopted in this country, although I think it is a better rule."

The same Judge in the case of *Desroches v. Gauthier*, 5 L. N. p. 404, speaking of the English doctrine of contributory negligence, says: "Such a rule does not exist in our law." This has since been held in many cases, of which the following may be mentioned:

"Under our law the person who suffers damage from an accident does not lose his recourse against the auteur of that accident because his own negligence contributed to it. The Court will inquire what is the primary cause, and if they find that to be the negligence of the defendant they will hold

him responsible, at the same time taking account of the plaintiff's own negligence and holding him responsible for his part in the damages." (*Jacquemin v. Montreal Street R. W. Co.*, Q. R. 11 S. C. 419.)

Judge Routhier in the case of *Fleury v. Quebec District R. W. Co.*, Q. R. 13 S. C. 268, says: "Common fault (*la faute commune*) can sometimes be sufficient to dismiss an action, but in the greater number of cases of damages it is only a cause of mitigation of damages. The doctrine of contributory negligence obtaining in England and the United States is not applicable here."

In that case a considerable reduction in the amount of damages proved was allowed in consideration of the plaintiff's own negligence.

In a very recent case, *Fortier v. Lauzier*, Q. R. 14 S. C. 359, Judge Larue puts the doctrine of the Quebec law thus:—

"If the defendant is alone in fault he is responsible for the whole of the damages, if both parties have been imprudent, that is to say, guilty of contributory negligence, compensation takes place, and finally, if all the imprudence has been on the side of the plaintiff, he is alone responsible."

In short, the doctrine of the civil law is, that every one is responsible for his own fault, and the mere fact that someone else shares in the responsibility, even if that person be the plaintiff, does not relieve the defendant from responsibility for his own wrong-doing.

#### FOREIGN JUDGMENTS.

Some points as to the recognition of foreign judgments by the Courts of Quebec deserve notice.

By Art. 1220 of the Civil Code "exemplifications of any judgment or other judicial proceeding of any Court out of Lower Canada, under the seal of such Court, or under the signature of the officer having the legal custody of such judgment or other judicial proceeding, make *prima facie* proof of the contents thereof."

By Art. 209 of the Code of Civil Procedure it is provided that the denial of such a judgment or proceeding "must be accompanied with the giving of security for the costs of the

commission required to obtain the proof of such document." A denial in the pleading without such security has no legal effect. (*Dunbar v. Almour*, M. L. R. 3 S. C. 142.)

"Any defence which was or might have been set up to the original action may be pleaded in an action on a judgment rendered out of Canada." (Code C. P., 210.)

Accordingly it has been held that a judgment of the Vermont Courts is not a *res judicata* (*chose jugée*) in Quebec, and that the discussion can be reopened on the matters which formed the basis of this judgment, and that "although Art. 210 speaks only of a defence to an action brought on a foreign judgment, yet it would seem that the same principle would apply when the foreign judgment is set up as a bar to an action in which the same matters are sought to be reviewed." Such is the jurisprudence in France. (*Rice v. Holmes*, Q. R. 16 S. C. 492.)

Mr. Justice Andrews, in refusing to recognize a plea of *lis pendens* between the same parties in the State of New York, said: "This is a reenactment of Art. 121 of the Ordinance of 1629. Its existence as a rule of law renders a foreign judgment comparatively valueless here, and adds a reason, which does not exist in England, for refusing to allow a foreign judgment to stay one in this Province: for in England a foreign judgment is *res judicata*, if a final one, and obtained without fraud." (*Howard-Gurney Co. v. King*, Q. R. 5 S. C. p. 182.)

But the provisions of Art. 210 could not, in all probability, be invoked by a plaintiff who, after taking unsuccessful proceedings in a foreign Court, should endeavour to maintain another suit for the same cause in the Province of Quebec; if the defendant pleaded the foreign judgment as a bar to the action, the plaintiff would probably not be permitted to reopen the controversy. (*Lafleur*, p. 244.)

In an action brought under such circumstances in the Courts of Nova Scotia, where the law is similar to Art. 210, King, J., in giving judgment upon an appeal taken to the Supreme Court of Canada, said: "This is an enactment available only by persons domiciled in Nova Scotia. It is intended as a weapon of defence, and not of offence. It is not lightly



to be supposed that the Legislature, while leaving the foreign subject to be proceeded against in Nova Scotia upon the judgment obtained abroad by the person of Nova Scotia domicile, intended that the latter should be protected against the consequences of his own unsuccessful incursions into the foreign field. I think the Act cannot be invoked for the appellant." (Law v. Hansen, 25 S. C. R. 69.)

In the Province of Ontario the English rule is in force.

There being no express provision on the subject, it has been held that the only prescription which can be applied to a foreign judgment in Quebec is thirty years, which is the usual period for prescription in that Province. (Art. 2242, King v. Demers, 15 L. C. Jur. 129.)

#### CIVIL DEATH.

This expression denotes the loss of all civil rights and status, and is used in contrast with natural death. "There is a death in deed (natural death) and there is a civil death, or death in law, *mors civilis* and *mors naturalis*." (Co. Litt. 132 a.)

It arose originally (1) by taking monastic vows; (2) by abjuring the realm; (3) by conviction and attainder for treason or felony.

"A person under these circumstances was said to be civilly dead, *civiliter mortuus*, and his estate descended to his heirs as it would have done in the event of his natural death." (Am. & Eng. Enc. VI. 64.)

But though civilly dead, he was yet under the protection of the law, and to kill him, without warrant of law, is murder." (Platner v. Sherwood, 6 Johns Ch. (N. Y.) 130; Commonwealth v. Bowen, 13 Mass. 356. See also Davis v. Laning, 18 L. R. A. p. 82.)

The only part of this doctrine that survives in England is in regard to a felon sent to penal servitude. By the Forfeitures Act, 1870 (33 & 34 V. c. 23, s. 1) his liberty and civil rights are suspended till he receives a pardon or has served his sentence; in the meantime his property is vested in an administrator for his benefit. (Eng. Encyc. Vol. III. pp. 35, 36.)

This status is even yet recognized in some of the United States (see Am. & Eng. Encyc. sub voce), but in Canada, with the exception of Quebec, civil death is unknown to the law. In the Province of Quebec, however, civil death is recognized by the law. (Civil Code, Arts. 31-38.)

Civil death (Leg. Comp. 1900, p. 316) results from condemnation to death or corporal punishment for life; and from solemn and perpetual vows made in certain Catholic religious communities (women's only) recognized at the time of the cession of Canada to England and subsequently approved. It carries loss of property, which is confiscated to the Crown; deprives of right to contract or to acquire, possess or dispose of property; to be a party to a lawsuit either as plaintiff or defendant; to be a juror, witness in an action or to any solemn or authentic deed; tutor or curator; or to marry. Any marriage previously contracted is dissolved for the future, in so far as regards its civil effects only; for the marriage tie subsists.

The consort and the heirs of the person civiliter mortuus may respectively exercise the rights and actions to which natural death would give rise. (See Arts. 31-38.)

Pardon, liberation, remission, or commutation restores civil ability, but without retroactive effect, except such effect be specially granted by an Act of Parliament. Civil death does not affect the consort's property or share in community; but obliges the consort to make an inventory. It affects only private property and share of community of the culprit.

In the year 1850 an action was brought in the Superior Court at Montreal to recover possession of land in the possession of the defendant. The defendant pleaded that the plaintiff had no locus standi, inasmuch as he had been condemned to death by Court martial in 1839; that this judgment had the effect of an attainder, under which all the plaintiff's property had been confiscated to the Crown, and consequently the plaintiff had no title to the property nor right to maintain the action; the plaintiff in reply set up a pardon granted to him in 1844, but the Court held against him and dismissed the action with costs. (Rochon v. Leduc, 6 R. J. R. Q. 52.)

But notwithstanding the fact that civil death is recognized in Quebec, the Courts of that Province do not allow any effect to be given therein to a foreign penal status.

In *Adams v. Worden*, 6 L. C. R. 237, an action was brought on a promissory note by a plaintiff who was at the time serving a term as a convict in Clinton Prison, in the State of New York. The defendant pleaded that by the laws of the State of New York the plaintiff was, during the term of his sentence, deprived and divested of all his civil rights, and could not legally institute or maintain any suit at law.

The Courts sustained a demurrer to this plea and overruled it, on the ground that no penal law of the State of New York could deprive a man of his property or civil rights in Canada. (*Lafleur*, p. 46.)

This is the general rule of English law. (*Dicey*, p. 476.)

#### *Interdiction.*

The Code contains very useful provisions by which persons who commit acts of prodigality, and thus occasion fears that they will dissipate the whole of their property, or who by reason of habitual drunkenness squander or mismanage their property, or place their family in trouble or distress, or transact their business prejudicially to their family, may be interdicted, that is, may be deprived of all control over or power of managing their property (Arts. 326, 336, etc.), and are, so long as the interdiction remains in force, legally incapable of contracting (Art. 986), or of administering their estate, or of being lawfully served with or of lawfully appearing in judicial proceedings. (*Lereux v. DeBeaujeu*, Q. R. 20 S. C. 235.) An action brought against a person who has been interdicted for prodigality, instead of against his curator, is radically wrong, and the defect cannot be cured by adding the curator as defendant. (*Ib.*)

But this disqualification is unknown to English law, and will be disregarded by English Courts. Accordingly, where a French subject of full age, who had been adjudged "prodigal" and placed under the control of a "conseil judiciaire," became entitled to a fund in Court in England, he was held entitled to payment out of the fund to himself upon his sole

receipt, notwithstanding the opposition of his "conseil judiciaire." (In re Selot's Trust, [1902] 1 Ch. 488.)

#### LEGITIMATION PER SUBSEQUENS MATRIMONIUM.

Legitimation per subsequens matrimonium had its origin in a constitution of Constantine. "It enacted" (says Mr. Irvine) "that children born in concubinage—a relation recognized by social customs and not regarded with censure—whose parents might have been lawfully married at the time of the birth of such children, should be legitimated by the subsequent marriage, provided the man had not already children by a lawful wife. Justinian abolished this restriction, enacting that the law should apply whether the father had legitimate children or not.

"The children so legitimated were subjected to the patria potestas, and entitled to all the rights of lawful children."

It is observable, however, that legitimation per subsequens matrimonium did not, by Roman law, extend to bastards generally, but was strictly confined to the offspring of the irregular form of marriage known as concubinage.

The canon law went further, and legitimated all bastards when their parents afterwards married, provided the father and mother were capable of contracting marriage at the date of the child's conception.

In the case of both civil and canon law the object of the law was to encourage persons living in concubinage to marry.

Legitimation per subsequens matrimonium obtains in Scotland, France, Holland, and other countries, whose system is based on the civil law; and has been said to be "all but universal in Christendom." English law, on the other hand, makes it an indispensable condition of a child's legitimacy that it shall be born after lawful wedlock; and Blackstone—"the somewhat indiscriminate eulogist of every anomaly of our law," as Lord Justice James once described him—pronounces this rule as "very much superior to that of the Romans." (Jo. S'y. Com. Leg. N. S. IV. p. 183-4.)

"Once a bastard always a bastard," has been said to be the English rule. In the time of Henry III. an attempt was

made by all the bishops to bring the common law into accord with the doctrine of the civil and canon law. This was defeated by the strenuous opposition of the Barons, who, with one voice, answered in words often quoted: "*Nolumus leges Angliæ mutare quæ hucusque usitatæ sunt et approbatæ.*" (See the Statute of Merton, 20 Hen. III. c. 9, now re-affirmed for Ontario by R. S. O. III. c. 340, s. 1.)

As in England, so in the Northern States of America, and in all countries governed by the English common law, a child born before the marriage of his parents cannot be legitimated by their subsequent marriage.

We shall naturally expect to find this principle of the Roman law recognized by the law of Quebec.

The Civil Code provides as follows:—Art. 237, "Children born out of marriage, other than the issue of an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother."

Art. 239, "Children legitimated by a subsequent marriage have the same rights as if they were born of such marriage."

In no other Province of Canada is this recognized as part of the municipal law. Of course, here, as in England, such legitimation may, under well established principles of private international law, receive recognition for every purpose except for intestate succession to real estate; to be an English "heir" something more is required than mere legitimacy; he must be born in wedlock.

Mr. Lafleur in his treatise on Conflict of Laws in the Province of Quebec says: "Our own Code admits legitimation per subsequens matrimonium, but does not solve the difficulties which may arise from a conflict of laws, nor does our jurisprudence furnish any precedents. If, for example, a child is born in England of parents then domiciled there, will legitimation result from a marriage celebrated in France after the acquisition of a domicile there by such parents? In other words, should our Courts have regard to the domicile of the parents at the time of the child's birth or to their domicile at the time of the marriage?" (p. 76.) Mr. Lafleur

quotes Savigny's view, which he says "appears to be founded on sound reasoning and should, it is submitted, be adopted by our Courts." This view is that legitimation by subsequent marriage is regulated according to the father's domicile at the time of the marriage and that the child's birth is immaterial, since it is the marriage and the subsequent recognition of the filiation which confer on the child the rights of legitimacy.

The English rule on the subject is well settled, that "such legitimation cannot take place unless permitted by the personal law of the father at the date of the marriage and also at the date of the birth." (Westlake, ss. 54, 55.)

The colony of Queensland has, by a recent Act, adopted the principle of legitimation by subsequent marriage. The principle section of the Act runs as follows:—

"Any child born before the marriage of his or her parents (and whether before or after the passing of the Act), whose parents have intermarried, or shall hereafter intermarry, shall be deemed, on the registration of such child as herein-after provided, to have been legitimated by such marriage from birth, and shall be entitled to all the rights of a child born in wedlock. Registration involves a statutory declaration by the husband that he is the father of his wife's illegitimate child."

#### NOTARY PUBLIC.

The office of notary public is a very ancient one.

Of the four classes in Rome of *tabelliones*, *tabularii*, *scribæ*, and *tabellarii*, the *tabelliones*, who framed the deeds which made private agreements and bargains good in law, approach most nearly to the modern conception of a notary.

That the office was at once one of great trust and importance, and one liable to be filled by men of no character, whose execution of its duties was a public scandal, may be illustrated in Massinger's "New Way to Pay Old Debts."

Sir Giles Overreach says to his sometime tool, Marrall:—

"Though the witnesses are dead, your testimony  
Help with an oath or two; and for thy master,  
Thy liberal master, my good, honest servant,

I know thou wilt swear to anything to dash  
 This cunning slight; besides, I know thou art  
 A public notary, and such stand in law  
 For a dozen witnesses; the deed being drawn, too,  
 By thee, my careful Marrall, and delivered  
 When thou wert present, will make good my title.  
 Wilt thou swear it?"

(32 Jour. Jurisp'ce, pp. 45, 580, 653.)

In England notaries were known before the Norman Conquest.

In Quebec it has been said that "the power of the notary rests on a foundation of adamant which no conquest or revolution can overthrow." (Canada (G. Smith), p. 5.)

"The positions and functions of notaries in the Province of Quebec are unique, and not generally understood, except by those who have resided for a considerable time in that Province, and have had sufficient legal work to come in contact with the profession.

The Quebec notary occupies a similar position to that of France, and one totally different from the official of similar name under English and American laws." (Lighthall, Notarial Profession, in Snow's Legal Comp., 1900, p. 238.)

The chief business in England of a notary consists in noting and protesting bills of exchange, certifying acts of honour, and in authenticating and certifying copies of documents, and preparing and attesting instruments going abroad.

English Courts do not, in general, take judicial notice of a notary's seal, or accept a notarial certificate as evidence of the facts certified. (Eng. Encyc. p. 185, sub voce.)

In the Province of Quebec the notarial profession is separate and distinct from that of the advocate, and the two professions cannot be practised by the same person. While a profession, it partakes also of the character of a public office. (Lighthall, p. 238.)

The candidate for this position must either possess a B.A. degree or its recognized equivalent, or pass an examination as to his educational qualifications to enter as a student. In his course of study the notarial student is obliged to acquire

as complete a knowledge of the law as the student for the profession of barrister, with the exception of the procedure of contentious proceedings and the criminal law, of both of which, however, the notary has to have a general knowledge.

The duties and functions of a notary may be summarized as follows: Notaries are public officers whose chief duties are (1) to draw up and execute deeds and contracts to which the parties are bound, or to which they desire to give that greater authenticity attached to acts entered into under public authority, and to assure the date thereof; (2) to preserve the same in safe keeping; and (3) to deliver copies or extracts therefrom.

They cannot be compelled to reveal even in Court their professional secrets.

Notarial deeds and copies thereof certified by the notary are considered authentic of themselves, and make proof of their contents in law.

A deed en minute is that which a notary executes and retains in his office; the original he must keep in his possession, delivering when required copies thereof, or extracts therefrom; certain deeds are not valid unless executed en minute before notaries, such as marriage contracts, inventories of estates and successions, hypothecs on real estate, donations, etc.

A deed en brevet is one which is completed by the signatures of the parties and that of the notary, and delivered to the parties. (Lighthall.)

The deed en minute is what is commonly understood when a "notarial deed" is spoken of. The deed en brevet is only used for unimportant matters.

The advantages of the notarial system are shewn by the fact that nearly the whole conveyancing business of the Province is done by the notaries. One of the most obvious advantages of the system is that of every deed there may be practically an unlimited number of duplicates. The original need never leave the notary's office, while as many authentic copies may be furnished as may be required for registration or other purposes, and it is not surprising that contracts of every kind should be commonly made in that form.



The number of deeds executed before a notary in good practice is very large. Such a one after a long professional career may have accumulated in his vault an imposing collection of from 40,000 to 50,000 deeds, all having his official signature and numbered consecutively from "No. 1 of my repertoire" (of which the newly fledged notary was probably as proud as the young barrister of his first brief) down to the last deed which closed his official life.

When a notary dies or ceases to practise, his "greffe" (as the collection of deeds is called) is deposited in the Court House (the Prothonotary thereafter certifying the copies), or transferred by order in council of the Lieutenant-Governor to another notary. By the latter plan deeds are often handed down from father to son in the same profession for several generations.

A very full history and description of the notarial office has recently (1902) been published by Dr. F. G. Marchand, member of the Royal Society of Canada.

#### CONCLUSION.

This article is an adaptation of one of a series of lectures on the jurisprudence of Canada delivered at Washington, D.C., in the year 1901.

In the preparation of the lecture on the Civil Code I received much helpful criticism and many valuable suggestions from a learned member of the Montreal Bar, Harry J. Hague, Esquire, to whom I desire to acknowledge my indebtedness.

My investigation has impressed me very much with a sense of the value and logical completeness of the Civil Code. I trust that many Ontario lawyers may be induced by this imperfect description of it to themselves study it. They will find the study one of great interest.

It is, perhaps, not creditable to our Bar, that so few of its members are even slightly acquainted with this great and scientific body of law which prevails among our fellow-countrymen in the Province of Quebec.

N. W. HOYLES.

Toronto.

## THE ALASKA BOUNDARY COMMISSION.

A correspondent of the London "Times" quotes "a very high American Government official as saying that 'any American who granted Canada's claims, or any part of them, could not continue to live in this country.'" Such is the threat of national ostracism that hangs over the fair trial which Canada may expect from Messrs. Root, Lodge, and Turner. The decision, therefore, seems to be pre-determined by the Government and Senate of the United States that the proposed reference to their so-called "impartial jurists of repute" shall be a travesty and a sham.

The Treaty of reference, however, is as reasonably fair as could be expected; and had the Commissioners been selected from the Supreme Court of the United States (as has been the practice in recent British arbitrations), full credit would be given to them as "impartial jurists of repute." Canadians can justly claim that in Lord Alverstone, Lord Chief Justice of England, Sir Louis A. Jetté, a retired Judge of the Superior Court, and now Lieutenant-Governor of Quebec, and the Hon. J. D. Armour, late Chief Justice of Ontario, and now one of the Justices of the Supreme Court of Canada, they have placed on the tribunal jurists who, in the truest sense, possess the qualifications prescribed by the Treaty of reference.

The questions which are to be answered by the Commission would have followed the words of the original treaty of 1825 more closely had the term "ocean" been given a more prominent place in them; for the interpretation of the terms which define the boundary line depend upon the expression "wherever the summit of the mountains . . . shall prove to be of a distance of more than ten marine leagues from the ocean," the strip of coast shall never exceed the distance of ten marine leagues therefrom.

This sentence makes the term "ocean" the kernel or central word around which the meanings of the other terms must be concentered; for it determines the outer line of the inland measurement of the strip of coast.

A rather unintelligible clause appears at the end of Article III. of this new Treaty, which says:

"The tribunal shall also take into consideration any action of the several Governments, or of their respective representatives, preliminary, or subsequent, to the conclusion of the said treaties [of 1825 and 1867], so far as the same tends to shew the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under and by virtue of the provisions of the said treaties."

Bearing in mind that the "several Governments" are the sovereignties of Russia, Great Britain, and the United States; and that their actions, or the actions of the "respective representatives" of those sovereignties, "to shew the original and effective understanding" of their sovereignties "in respect of the limits of their several territorial jurisdictions," are to be taken into consideration by the tribunal, naturally arouses some curiosity in students of International Law as to the intention of the United States in having this peculiar and lonely provision in the Treaty,—especially as there is no question bearing upon it to be answered.

Between sovereignties, treaties, or conquest, are the ordinarily recognized "actions" tending to shew the original and effective understanding of the sovereigns respecting their territorial jurisdictions or acquisitions. Their "respective representatives," as given in Wharton's Digest of International Law, p. 88, are Ambassadors, Ministers Plenipotentiary, and Envoys, or Ministers Resident, who are commissioned nominally or actually by the Sovereign; and Chargés d'affaires, who are appointed by the Secretary, or Minister, for Foreign Affairs. What the diplomatic correspondence or actions of these "respective representatives" may shew as to an original and effective understanding of these sovereignties in respect of their territorial jurisdictions, we must await their publication.

But, as some reliance has been placed by an Ex-Secretary of the United States upon some British and Canadian maps and charts, it may be that this clause is intended to enable the United States to offer such before the Commission as evidence of the effective understanding of Great Britain respecting her territorial jurisdiction.

Of the maps three are claimed to be Canadian: one published in 1831, by Joseph Bouchette, Deputy Surveyor-General for Lower Canada; one in Toronto, by the Hon. Joseph Cauchon, Commissioner of Crown Lands in 1857, when the Province of Canada only extended westward to the Lake of the Woods; and another in British Columbia by the Hon. W. Smithe, Commissioner of Lands and Works, 1884. But, as none of these officers can be claimed as the "representative" of the sovereignty of Great Britain, we cannot at present surmise how their maps, or the boundary tracings on them, can be received as evidence of the action or effective understanding of Great Britain as to the limits of her territorial jurisdiction under the Treaty of 1825.

The same may be said of Arrowsmith's map of 1832 dedicated to the Hudson's Bay Company, and of the Hudson's Bay Company's map of 1857, ordered to be printed by the House of Commons as part of the Chairman's evidence before a Committee of the House.

Even if these maps had the official sanction of the Governor of a colony, his position as the representative of the Crown is limited to the local powers and functions expressly or impliedly intrusted to him by his commission: *Musgrove v. Pulido*, 5 App. Cas. 102 (1879). And by no possible construction of the terms of such commission could he be held to be authorized by any official act of state to affect the territorial sovereignty of the British Crown within his colony, or do any act which would have the effect in law of transferring any part of the colony to a foreign sovereign.

It is the prerogative of the sovereign, or head of the executive government of a nation, to dispose of or alienate the territory of his sovereignty, and to appoint the proper officers who are to act as his representatives and to

prescribe the manner in which such disposition or alienation by cession, grant, or otherwise, is to be made. And such prerogative power, being sovereign, can only be exercised, or affected, by the sovereign or other head of the executive government, or his duly authorized representative.

Nor can two Russian maps of 1827 and 1829 be evidence against Great Britain of what Russia, two years after signing the Treaty of 1825, considered to be the boundary under that Treaty.

Much reliance has been placed on a chart of the northwest coast of America published by the British Admiralty in 1877, 1898, and 1901, on which the boundary line is traced as claimed by the United States. But a chart being a marine map which is published solely for the general information of navy officers and navigators as to coast lines, bays, harbours, rocks, and other marine matters useful for seamen, is not intended to give or to be evidence respecting the inland territorial or land boundaries of nations. No such marine chart can therefore be held to be evidence of the original and effective understanding of the Crown of Great Britain as to the inland boundary of the territorial possessions or jurisdiction of the Crown under the Treaty of 1825.

It will be a surprise to the doctrines of International Law if the inherent British-Canadian nationality of the land within this disputed territory—(*cujus est solum ejus est usque ad cælum*)—can be changed without treaty, or cession, or conquest, by maps or charts in no way authorized by the British Crown nor any of its representatives recognized as such by International Law. Neither maps nor charts, nor foreign trespass, nor violation of British sovereignty, can divest any territory of its British nationality and sovereignty.

T. H.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Accident Insurance.]**—It was held in *In re Mardorf and Accident Ins. Co.*, 19 T. L. R. 274, that a policy of insurance, providing for payment of a certain sum if the assured should be injured by external and accidental violence and death should result within three months, the death being directly and solely caused by some outward and visible means, and not caused or arising from disease or other intervening cause, applied to the case of death from blood poisoning supervening upon a scratch inflicted by the assured's thumb nail while he was taking off a sock.

**Bailment.]**—*Cordey v. Cardiff Cold Storage Co.*, 19 T. L. R. 256, was an action for damages for negligence. Cheese was stored in a cold storage warehouse "at owner's risk," and the storage company was not to "be responsible for damage or loss caused through failure of machinery, fire, nor from any other cause whatsoever." The cheese was damaged owing, as was alleged, to the temperature having been negligently allowed to get too low. But it was held that wilful misconduct, intentional injury, or reckless disregard of the property, would have to be made out before liability would arise, and the action was dismissed. The nature of the liability of a warehouseman, when unprotected by such a provision as that above referred to, will be found discussed in *Dunn v. Prescott Elevator Co.*, 4 O. L. R. 103.

**Bicycle.]**—The judgment in *Simpson v. Teignmouth and Shaldon Bridge Co.*, 18 T. L. R. 104, 234, noted 22 C. L. T. 91, holding that a bicycle was not a "carriage" within the meaning of that word as used in a special toll-bridge Act, was affirmed: 19 T. L. R. 225.

**Bill of Exchange.]**—A condition in a joint and several promissory note by two makers that "no time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the

\*Including the cases in No. 15, Vol. 19, week ending March 4th, 1903.

holder to proceed against any other party" was, in *Kirkwood v. Carroll*, 19 T. L. R. 253, held by the Court of Appeal not to invalidate a promissory note. An objection that making the amount payable in instalments with a provision for acceleration in the event of default also deprived the instrument in question of the character of a promissory note was also overruled.

**Building Restrictions.**]—*Wright v. Berry*, which came before Byrne, J., on motion for interlocutory injunction, 18 T. L. R. 370, noted 22 C. L. T. 133, has now been dealt with by the Court of Appeal: 19 T. L. R. 259. Byrne, J., had held that the motion was premature, the plaintiff really wishing to attack the contemplated mode of user of the houses in question, which structurally were in accordance with the restrictions, which provided for the erection of detached or semi-detached houses. The plaintiff then amended his claim, but the Court of Appeal, affirming the judgment at the trial, held that the mode of user of the houses in question—homes for the aged poor—could not be interfered with.

**Chose in Action.**]—The effect of the decision in *Montague v. Weston, etc., Light Railways Co.*, 19 T. L. R. 272, is that the bond of a company in favour of a named person is not a negotiable instrument in such sense as to enable a transferee of it for a limited purpose to confer a good title to it upon a third person by a transfer made in fraud of the original transferor.

**Company.**]—In *re Innes and Co. (Limited)*, 19 T. L. R. 226, is a good example of the danger of attempting to treat as paid-up shares, shares which are really paid-up only in name. A private company was formed to take over a business, the price being fixed at £6,000, payable as to £3,000 in cash and as to £3,000 in shares, but the capital of the company was fixed at £25,000 in £10 shares, all the shares being declared to be paid up, and all, except 100 shares which were retained by the company to answer a special contingency, being issued as paid-up shares to the corporators. It was held that the arrangement was an *ultra vires* one, and that though the corporators had acted in good faith and had all

concurrent in the issue of shares in this form, the shares, except as to the actual £6,000 of purchase money, must be treated as unpaid, with the usual result. The distinction between such a case as this and one where the assets purchased are in good faith taken as equal in value to the capital stock must be borne in mind.—In *re The Manchester and Liverpool Transport Company Limited*), 19 T. L. R. 227, is another winding-up case, useful as again stating the rule that an order will not be made where those opposing the application shew that no possible benefit can accrue from making the order. Pecuniary benefit is not essential; the advantage of an independent investigation into the company's affairs may justify the granting of an order.

**Compromise of Action.]**—The extent of counsel's right to compromise an action has been fully dealt with in *Neale v. Gordon-Lennox*, 18 T. L. R. 390, noted 22 C. L. T. 174, 18 T. L. R. 494, noted 22 C. L. T. 207, and 18 T. L. R. 791, noted 22 C. L. T. 361. The extent of a solicitor's right in that regard is dealt with in *Carruthers v. Newen*, 19 T. L. R. 247, the law being there stated to be (mainly on the authority of *Prestwich v. Poley*, 18 C. B. N. S. 806) that in the absence of express instructions to the contrary a solicitor has a general authority to compromise an action, and that this right extends to the agent of the solicitor on the record.

**Contract.]**—The judgment of a Divisional Court in *Smith v. Gold Coast and Ashanti Explorers, Limited*, 19 T. L. R. 152, noted *ante* p. 100, as to a contract of employment for a year, the employment to begin on the day following the making of the contract, not being within the Statute of Frauds, was unsuccessfully attacked in the Court of Appeal upon a question of fact as to the time of the beginning of the employment: 19 T. L. R. 268.—*Turner v. Melladew*, 19 T. L. R. 273, is also a Statute of Frauds case, the point decided being that acts of part performance were not sufficient to validate an oral agreement for a partnership for a term of three years. The decision is based upon the principle that the doctrine of part performance is applicable only to cases of contracts of which specific performance would be decreed, a form of relief not applicable in the case in question.



**Criminal Law.]**—Whether the public room of a public house was, under the circumstances stated in the report, a place used for betting was the question dealt with in *Rex v. Deaville*, 19 T. L. R. 223, and as to this see *Tromans v. Hodgkinson*, 19 T. L. R. 19, noted *ante* p. 20.—The absence for seven years with knowledge of the first consort's existence which, under 24 & 25 V. c. 100, s. 57 (Criminal Code, s. 275), protects in prosecutions for bigamy, was held in *Rex v. Faulkes*, 19 T. L. R. 250, to include the case of wilful absence of the person accused, who therefore, although he had deserted his wife and had made no efforts before his second marriage to ascertain whether she were living, was acquitted.

**Derogation from Grant.]**—The Court of Appeal, 19 T. L. R. 284, reversed the judgment in *Quicke v. Chapman*, 18 T. L. R. 817, noted 22 C. L. T. 362, holding that, under the circumstances, there had not been an implied grant of easement of light, and therefore that the question of derogation therefrom did not arise.

**Injunction.]**—In *Mayor of Devonport v. Tozer & Son*, 19 T. L. R. 257, it was held by the Court of Appeal, affirming the judgment of Joyce, J., that an action by the municipality would not lie for an injunction to restrain the defendants from putting up buildings in alleged violation of municipal by-laws, and that the remedy was to proceed for the penalties, or to bring an action in the name of the Attorney-General. The principles of law on this point stated by Buckley, J., in *Attorney-General v. Ashborne Recreation Ground Company*, 19 T. L. R. 40, noted *ante* p. 18, were approved.

**Landlord and Tenant.]**—*Surtees v. Woodhouse*, 19 T. L. R. 221, turned upon the meaning of a covenant in a lease by the lessee to pay all present and future rates, taxes, etc., charged upon the premises, and a covenant in a sub-lease by the sub-lessee to observe and perform all the lessee's covenants. It was held that the sub-lessee was not liable to pay rates charged upon the premises before the making of the sub-lease, though not payable till afterwards, the case thus in principle being not unlike *Cumberland v. Kearns*, 17 A. R. 281.

**Merger.]**—In *Capital and Counties Bank v. Rhodes*, 19 T. L. R. 280, the Court of Appeal deal in elaborate judgments with the question of merger in the case of mortgage of leaseholds, and subsequent acquisition of the reversion, and also with the construction of sections of the Land Transfer Acts.

**Mortgage.]**—The defendant in *Jared v. Clements*, 19 T. L. R. 219, purchased land upon which the plaintiff had an equitable mortgage by deposit of title deeds. The purchaser's solicitors had notice of the equitable mortgage and required its discharge, and the vendor's solicitor, who was also solicitor for the equitable mortgagee, gave them the title deeds with what was apparently a receipt by the equitable mortgagee for his claim, the signature to this receipt having been forged by the solicitor. The purchase money was paid to him, and the amount of the equitable mortgage misappropriated by him. It was held that the purchaser's acquisition of the legal estate did not cut out the equitable mortgage of which he had notice, and that the loss must fall on him.—The judgment in *Jarrah Timber and Wood Paving Corporation v. Samuel*, 18 T. L. R. 674, noted 22 C. L. T. 299, as to an option to purchase mortgaged stock at a fixed price being in effect a clog on the equity of redemption, and therefore void, was affirmed by the Court of Appeal: 19 T. L. R. 236.

**Sale of Goods.]**—*Preist v. Last*, 19 T. L. R. 278, must be used with some caution, turning as it in terms does upon ss. 13 and 14 of the Sale of Goods Act, 1893, which however are intended to be a codification of the then existing case law. The plaintiff bought from a chemist an indiarubber hot-water bottle, which burst on the fifth day of its use, and the plaintiff was severely scalded. It was held that the principle that a purchaser of a specific article of a kind dealt in by the vendor, purchased for a specific purpose, is entitled to rely on the vendor's skill and judgment and takes the article with an implied warranty of its fitness, applied, and that the plaintiff was entitled to damages.

**Settled Estates Act.]**—It was held in *In re Blagrove's Settled Estates*, 19 T. L. R. 280, that the installation of an electric light system in a house was not an "improvement to

buildings" within the meaning of the Settled Land Act, 1890. *Compart R. S. O. 1897 c. 71, s. 14.*

**Specific Performance.]**—The judgment in *Van Praagh v. Everidge*, 18 T. L. R. 593, noted 22 C. L. T. 266, where a purchaser at a sale by auction bid for and was declared the purchaser of a property he had no intention of bidding for, was reversed by the Court of Appeal, 19 T. L. R. 220, on the ground that, the contract and conditions of sale signed by the auctioneer on behalf of the defendant on the defendant refusing to complete being erroneously dated 17th October, when the sale really took place on 18th November, there was not a sufficient memorandum under the Statute of Frauds. The Court also were evidently prepared to hold that in view of the purchaser's mistake as to the property he was bidding for the parties were never *ad idem*, but it became unnecessary to decide that point.

**Trade Name.]**—In *Weingarten Brothers v. Charles Bayer and Co.*, 19 T. L. R. 239, the term "erect form" as applied to corsets was held not to be a mere descriptive name, and its use by the defendants, in conjunction with scrolls and devices resembling those in prior use by the plaintiffs, and therefore calculated to deceive purchasers, was restrained.

**Will.]**—By the will in question in *Waugh v. Cripps*, 19 T. L. R. 238, the testator devised two houses to a daughter for life; after her death one house to a granddaughter and her heirs, and the other house to a grandson and his heirs; if either the granddaughter or grandson "should die without an heir their share is to go to the survivor's heir or heirs." It was held that the granddaughter and grandson took an estate tail in the houses devised to them respectively, the devise over to the survivor's heir or heirs shewing that heirs of the body was meant in the first part of the devise. But the same limited meaning was not given to the words "survivor's heir or heirs."—The judgment of the Court of Appeal in *Pelham Clinton v. Duke of Newcastle*, 18 T. L. R. 7, noted 21 C. L. T. 497, was affirmed by the House of Lords: 19 T. L. R. 275.

## EDITORIAL REVIEW.

**The Ontario Assembly Bribery Charges.**

The astounding charges made by a member of the Legislative Assembly of the Province of Ontario against another member, who is also one of the Lieutenant-Governor's advisers, have stirred the community to its depths, and revealed the rottenness of political partyism in Ontario to the eyes of the world. For, whatever view of the charges one may choose to take, the degradation of party politics is manifest. On the one hand, it is said that a member of the Executive Council has, with unblushing corruptness and unparalleled cynicism, paid, practically with his own hands, a sum of money to an opponent to purchase his support at a critical period of the life of the Administration. And on the other side it is alleged or suggested that the charges are unfounded and the outcome of a vile plot to injure the Government. There are no words to describe such a situation. The result of the inquiry into the charges, whether by a commission of Judges or a committee of the Assembly, will, of course, be awaited with the greatest anxiety. But, whatever the result, the Province stands disgraced by its legislators, on one side of the House or the other.

**Rights of Criticism and Those Criticized.**

The curious and unusual refusal of the manager of a London theatre to admit the critic of the *Times* to the first representation of a new play by Mr. Henry Arthur Jones has given rise to a flood of correspondence and incidentally to the discussion of the legal rights of critics and managers. It seems to be well established that the owner of a theatre or other so-called "public" place of amusement or entertainment

has a right to refuse to admit any one, with or without cause, and even to expel without cause one who has already been admitted, and without returning him his money. So that the manager has the matter in his own hands, and, if exclusion of the critic is a punishment for previous unfavourable criticism, and a remedy against the like in the future, it may become the fashion to follow the example of the London manager. Provided the criticism be honest and fair, however damaging, there is no right of action against the critic. *Merivale v. Carson*, 20 Q. B. D. 275, is an instance of the writers of a play suing a critic; the principles in issue were there discussed by Lord Bowen, who shews that no question of privilege arises, for privilege is a grant to some one of an immunity greater than is possessed by other persons, whereas the right to criticize belongs to the whole world, and the exercise of it is invited by those who write. So long as the commentator is honest in his intentions and expresses his views in a fair manner, it does not much signify what the views are. The critic must be careful what he says about matters of fact, though he may indulge his fancy in matters of opinion.

#### **Prevention of Corruption by Secret Commissions.**

The Prevention of Corruption bill (recently introduced into the House of Lords) is substantially the measure advocated by the late Lord Chief Justice (Russell) to restrain the spread of an insidious system of secret commissions. The proposal has been several years before the eyes of Parliament in slightly different forms. The present bill, backed by the Lord Chancellor, is probably as compact as is possible. In substance, the whole measure is contained in two sections. By the first it is enacted that a person shall be guilty of a misdemeanour rendering him liable, on conviction on indictment, to imprisonment with or without hard labour for a maximum of a year, or, alternatively, to a fine of a maximum of £500, or, if summarily convicted, rendering him liable to four months' imprisonment or a fine of £50, if he commits any of the following offences: (a) If, as an agent, he, without his principal's knowledge, accepts or obtains, or agrees

to do so, for any person, for himself or for any one else, any gift as an inducement or reward to do or forbear from doing any act or for shewing favour or disfavour to any one in relation to his principal's business. (b) If he corruptly gives or offers any gift to induce an agent to do or abstain from doing such acts as aforesaid. (c) If he gives an agent a false receipt, account, or other document which is intended to mislead the principal. A wide and general definition of "agent" embraces any person employed by or acting for another, and "principal" will include an "employer." Section 2 is important in that it lays down the requirement that prosecutions can only be instituted with the consent of the Attorney-General or Solicitor-General for England or Ireland. The expenses of indictments will be as for indictment for felony, and a Court of Quarter Sessions is given jurisdiction. The bill applies to Scotland also, with certain special provisions.—(*London Law Times*.)

#### Recent American Decisions

*Damages*.—Damages for mental suffering are held, in *Kline v. Kline* (Ind.), 58 L. R. A. 397, to be properly included in the compensation awarded to one upon whom an assault is committed by coercing him into abandoning a house by threats of shooting him with a gun which the assailant pointed at him.

*Easement*.—An adverse user of an easement for the period specified in the statute barring actions for the recovery of land is held, in *Boyce v. Missouri P. R. Co.* (Mo.), 58 L. R. A. 442, to raise a conclusive judicial presumption of a prescriptive right by lost grant.

*Marriage*.—To excuse the breach of a promise of marriage on the ground of illness, it is held, in *Smith v. Compton* (N. J. Err. & App.), 58 L. R. A. 480, that there must be such a disease or complication of diseases as renders the making of the marriage contract, and the consummation of the marriage by marital intercourse, impossible.

*Master and Servant*.—The act of an employee in charge of a gravel train, who, after having tried in vain to prevent

urchins from hanging to the end of the train by warnings and threats, catches one of them and lectures him, is held, in *Palmisano v. New Orleans City R. Co.* (La.), 58 L. R. A. 405, not to render the master liable, where the child, upon being released, runs blindly in a direction converging with that of a coming car, and collides with the car, and is injured.

Injuries caused by the failure of a foreman, who has assumed the duty of warning a workman in the bottom of the trench when dirt is to be dumped into it by other workmen, to give the warning in a particular instance, is held, in *McLaine v. Head and Dowst Co.* (N. H.), 58 L. R. A. 462, not to render the master liable, since the master is under no duty to thus warn the employee.

*Nuisance.*—The owner of a dwelling-house, which he himself occupies as a home, is held, in *Swift v. Broyles* (Ga.), 58 L. R. A. 390, to be entitled to just compensation for the annoyance and discomfort occasioned by noxious gases and other harmful and injurious substances sent out into the air by the maintenance of chemical works on adjoining premises.

The renewal by a tenant of his lease after the creation by a third person of a nuisance by his method of conducting his business, injuriously affecting the right of occupancy and the tenant's private property, is held, in *Bly v. Edison Electric Illum. Co.* (N. Y.), 58 L. R. A. 500, not to preclude the tenant from maintaining an action to abate the nuisance and to recover the damages for his injuries.

*Proximate Cause.*—A prior and remote cause is held, in *Missouri P. R. Co. v. Columbia* (Kan.), 58 L. R. A. 399, not to furnish the basis of an action for the recovery of damages, if such remote cause did nothing more than furnish the condition, or give rise to the occasion by which the injury was made possible, and there intervened between such prior or remote cause and the injury a distinct, unrelated, and efficient cause of the injury.

*Solicitor.*—A contract between a wife and her solicitor, providing that, for his services in procuring an allowance of alimony and enforcing its payment, he shall receive a share

of the alimony recovered, is held, in *Lynde v. Lynde* (N. J. Err. & App.), 58 L. R. A. 471, to be void, not only because a claim for alimony is incapable of assignment, but also because the contract is in contravention of public policy.

*Street Railway*.—If one in charge of an electric car, seeing that a horse is frightened by the approach of the car, and that its driver is in danger, continues to sound the gong or ring the bell, and further frightens the horse and causes it to run away, the car company is held, in *Oates v. Metropolitan Street R. W. Co.* (Mo.), 58 L. R. A. 447, to be liable for the injuries thereby caused to the driver.

*Sunday*.—For a butcher to sell meat to his customers on the Lord's Day is held, in *Arnheiter v. State* (Ga.), 58 L. R. A. 392, not to be a work of "necessity or charity," within the exception of a statute forbidding any person to pursue his business or work on the Lord's Day.

*Survivorship*.—In case of the death of two persons in a common calamity it is held, in *United States Casualty Co. v. Kacer* (Mo.), 58 L. R. A. 436, that there is no presumption of survivorship.

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# THE CANADIAN LAW TIMES.

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MAY, 1908.

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## WHEN "COMMON EMPLOYMENT" EXONERATES EMPLOYER.

THE contractual relation existing between employer and employee was, at common law, fourfold. First, there was an implied undertaking, on the part of the employer, that the premises in which and the plant, machinery, tackle, and appliances with which he carried on his operations were reasonably safe and in such proper condition as with the exercise of due care, on the part of the employee, he could safely do his work and discharge his duty without exposing himself to unnecessary risks or danger. See judgment of Lord Herschell in *Membery v. Great Western Railway Co.*, 14 App. Cas. at p. 191.

In the second place, the law cast upon the employer the duty to see that a proper and safe system of using the machinery and appliances was adopted, for a defective system was as likely to cause injury as defective machinery.

Lord Watson thus defined this rule in *Smith v. Baker*, [1891] A. C. at p. 353: "But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 V. c. 42), that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself." And further on, in the same judgment, to the like effect are the following words of the learned Lord: "The judgment of Lord Wensleydale in *Weems v. Mathieson*, 4 Macq. 226, clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point

of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used." See, also, *Webster v. Foley*, 21 S. C. R. at p. 580.

Further, it was also the duty of the employer to engage proper and sufficient persons to do the work, whether acting in the capacity of superintending or engaged in working along with the other workmen. In *Wilson v. Merry*, L. R. 1 Sc. & D. 326, the principle was enunciated, that culpable negligence, in supervision, if the master takes the supervision on himself, or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, may furnish grounds of liability in case the servant is injured through such negligence. Lord Chancellor Cairns in his judgment said: "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. As was said in the case of *Tarrant v. Webb*, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

In the fourth place, if the employer or master intervenes or personally directs the work he is liable to the employee for negligence in the conduct of the work. This principle of law found fitting expression in the judgment of Crompton, J., in *Ashworth v. Stannix*, 3 E. & E. at p. 706: "Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. . . . For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable."

These briefly are the duties assumed by the employer, when the relation of master and servant is entered upon. The corresponding duties and risks assumed by the employee may be thus briefly stated. Firstly, he undertakes to run all the ordinary risks of the service. In the second place, if the employment is necessarily hazardous, he accepts the service subject to the risks incidental thereto. Thirdly, he assumes the risk of negligence upon the part of a fellow servant. The reason of the rule that a servant cannot bring an action against his master for an injury sustained by the negligence of a fellow servant, engaged in a common employment, as well as for the risks of ordinary service, is, that the servant is supposed to have contemplated, at the time of the contract, the possibility of such a contingency, and to have made allowance therefor in his wages. While the contractual relation existing between the parties imposes upon the employer the duty on the one hand to take care to select competent servants, a corresponding liability is assumed by the employee, on the other hand, to undergo the risks of the negligence of his fellow servants.

The defence of common employment is not applicable unless the servant injured, and the servant causing the injury, were engaged in a common employment and in the service of a common master. This proposition was clearly laid down by Lord Justice Brett, in *Swainson v. North Eastern Railway Co.*, 3 Ex. D. at p. 349, in these words: "I think that the authorities bear out the proposition laid down in the Exchequer Division that in order to give rise to the exemption there must be a common employment and a common master." Lord Justice Cotton, in his judgment in the same case, at p. 351, said: "But it is a rule that when one member of an establishment is injured by the negligence of another member of it, the master is not answerable. It is unnecessary to consider how the rule arises; but it is clear that if a person takes upon himself to act as a member of an establishment, he cannot maintain an action against the head of it for an injury occasioned by the negligence of any person belonging to it."

Lord Watson's judgment in *Johnston v. Lindsay*, [1891] A. C. at p. 371, places the question in a clear light. After discussing the general principle of the rule, his Lordship proceeds: "The principle of the master's immunity in such cases, frequently termed the doctrine of collaborateur, is of comparatively recent origin. In the law of England it can hardly be traced further back than *Priestly v. Fowler*, 3 M. & W. 1, which was decided in 1837. It was rejected by the Courts of Scotland until 1858, when, for the first time in either country, it was fully explained and reduced to its proper limits by Lord Cranworth, in the Scotch case of *Bartonshill Coal Co. v. Reid*, 3 Macq. 266. The doctrine had previously been formulated by the Supreme Court of Massachusetts, in a judgment delivered by Chief Justice Shaw, in *Farwell v. Barton and Worcester Railroad Corporation*, 4 Metcalf 49, which was referred to with approval by Lord Cranworth. It is needless to quote passages from the opinions of Lord Cranworth and Chief Justice Shaw, which are now so familiar to professional lawyers. It is sufficient to say that, in my opinion, the rule, as laid down by these eminent Judges, is strictly confined to the case of common employment under a common master, and that the reasons which they assign for the introduction of the rule have no application to any other case."

The language made use of by Chief Justice Shaw, in the leading American case already referred to, was as follows: "The general rule is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any legal principles which should exempt the perils arising from the carelessness of those who are in the same employment. They are perils incident to the service."

What, then, it may be asked, is meant by the term "common employment," which exonerates the employer from liability for injury sustained by an employee through the negligence of a fellow servant? The Courts have found great

difficulty in defining it accurately, as well as determining the exact limits of its application. Lord Justice Brett thus defines it in *Charles v. Taylor*, 3 C. P. D. at p. 496: "I shall now enunciate one principle relating to the question; I do not say there may not be more. It is this: when the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time, that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other." The principle thus laid down was further illustrated by Lord Justice Thesiger, in the same case, at p. 498: "It has been urged that an employment is "common" within the meaning of the rule exempting employers only when the immediate object of the work in which the servants are engaged is the same; but I think that this argument is answered by the principle laid down in *Morgan v. Vale of Neath Railway Co.*, L. R. 1 Q. B. 149, and it follows from this case that where there is one common general object, in attaining which the servant is exposed to risks, he is not entitled to sue the master if he is injured by the negligence of another servant whilst engaged in furthering the same object."

Ever since the decision in *Bartonshill Coal Co. v. Reid*, 3 Macq. (H. L. Sc.) 300, the general effect of the decisions has been to extend the application of the term "common employment." It gradually came to cover the most dissimilar occupations.

In 1866 the Court had gone to the extent of holding in *Feltham v. England*, L. R. 2 Q. B. 33, that a foreman or manager whose directions an employee is bound to obey, is a fellow servant of a subordinate within the meaning of the term "common employment." Mellor, J., delivering the judgment of the Court, is thus reported at p. 36:—"We think that this case ranges itself with a great number of cases, by which it must be considered as conclusively settled, that one fellow servant cannot recover for injuries sustained

in their common employment from the negligence of a fellow servant, unless such fellow servant is shewn to be either an unfit or improper person to have been employed for the purpose: *Morgan v. Vale of Neath Railway Co.*, 5 B. & S. 570. And this rule is not altered by the fact that the servant to whom the negligence was imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey."

The distinction between "common object" and "common immediate object" is set forth in very clear terms by Chief Baron Pollock, in *Morgan v. Vale of Neath Railway Co.*, L. R. 1 Q. B. at p. 155:—"I only wish to add a single sentence. It appears to me that we should be letting in a flood of litigation, were we to decide the present case in favour of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it would be sought to split up the employees in very large establishments into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object. This shews we must not over-refine, but look at the common object, and not at the common immediate object."

*Wilson v. Merry*, L. R. 1 Sc. & D. 326, marks the complete development of the idea towards which the current of decisions had for a long time been tending—to include all grades of service from the lowest to the very highest, within the principle of non-liability in the case of common employment. The reasons for the extension of the rule are thus concisely set forth by Lord Colonsay, at p. 343 of this leading case:—"The constantly increasing scale on which mining and manufacturing establishments are conducted, by reason of new combinations and applications of capital and industry, has necessarily called into existence extended organizations for management—more gradations of servants, more separation or distribution of duties, more delegation of authority, and less of personal presence or interference of the master. The same personal superin-

tendence and supervision by owners or masters, common and beneficial in some minor establishments, is in many cases unattainable, and, even if attainable, would not be beneficial. The principles of the law, however, have sufficient elasticity to enable them to be applied, notwithstanding such progressive changes in the manner of conducting business."

The doctrine of common employment has no place in the law of Quebec, for the law in that Province takes its rules of decision, when not governed by statute, from the common law of France, which does not exonerate an employer when a servant receives injury by the negligence of a fellow servant. See *The Queen v. Filion*, 24 S. C. R. 482; also *Asbestos and Asbestic Co. v. Durand*, 30 S. C. R. 285.

Such, then, were the obligations of the employer, at common law; and such, his special exemptions. Shortly after the decision in *Wilson v. Merry*, legislation was invoked for the purpose of imposing a duty on the employer to safeguard the welfare of the workman.

In 1880 the Employers' Liability Act was passed for the like purpose of protecting the workmen by cutting down the doctrine of common employment.

The following rules will be found to embrace the principal common law rights and duties, as well as exceptions, between those holding the relation of employer and employee:—

1. There is an obligation, on the part of the master, believed by some to rest upon the implied contract of service, to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workman in a fit and proper manner.

2. It is next the duty of the employer, in the event of his not personally superintending and directing the work, to select proper and competent persons to do so, and to furnish them with adequate appliances for the purpose.

3. A duty is also cast upon the employer, to see that no injury occurs through a defective system of using machinery or conducting the work.

4. In the fourth place, if the employer personally superintend and direct the work, he is bound to see that the em-

ployee, being himself in the exercise of due care, can perform his work without being exposed to unnecessary danger.

5. It is a part of the implied contract between the parties, that the employee assumes the ordinary risks of the employment, which are apparent, and which he has as good an opportunity, it may be better, as the master of ascertaining and avoiding.

6. The employee, also, assumes upon entering his employment the risk of injury arising from the negligence of his fellow servants engaged in a common employment.

7. If the negligence of the master is a concurring cause with that of the fellow servant to produce the injury complained of, the master will be liable therefor.

8. The doctrine of respondeat superior, which made the master responsible for the negligence of his servant, was borrowed from the Roman law. It was introduced into the legal system of England about 250 years ago, during the reign of Charles II.

9. The first limitation of this rule occurred in 1837, in the great leading case of *Priestly v. Fowler*, 3 M. & W. 1, which relieved the master of liability, when the injury was caused by a fellow servant. In 1858 this rule was affirmed and extended by the case of *Bartonshill Coal Co. v. Reid*, 3 Macq. 300.

10. English Judges have been disposed to give as broad an application as possible to the rule which absolves the master from liability for injuries sustained by one servant through the negligence of another engaged in the same employment. Their later decisions hold, although the employments in which the servants were respectively engaged were different in kind, that this did not prevent their standing to each other in the relation of fellow servants, so long as they worked under a common superior, and the kind of work performed by each of them, respectively, was designed and immediately directed towards producing a common result.

11. The employee, in order to succeed at common law against the employer, for injury sustained in the service, must prove that the defendant either failed to furnish a



proper place in which and suitable appliances with which to carry on the work; or that he undertook personally to superintend the work and neglected such duty; or that the persons he employed were not proper and competent persons; or that his system of management or conduct of the business was defective.

12. It follows as a sequitur, that the employer is not liable, if the injury was the result of accident or the employee's own negligence, or by or through the negligence of a fellow workman engaged in a common employment.

13. The doctrine of common employment was extended by the Courts from time to time until it included every employee from the very lowest to the highest, so that a miner was held to be a fellow servant of the manager of the miner: *Bartonshill Coal Co. v. Reid*, 3 Macq. 300.

14. The tending of modern legislation has been in the direction of guarding, as much as possible, the safety of the workmen. One of the leading provisions of the Factory Act makes it an absolute duty, which the employer must observe at his peril, to fence places and machinery which expose the employee to personal risks. The maxim *volenti non fit injuria* does not avail as a plea, where there has been a breach of a statutory obligation.

15. The Employers' Liability Act, 1880, with a view of still further protecting the workman, made a great inroad upon the common law doctrine of common employment. It provides that if an accident happens to a manual labourer, through the negligence of one in authority, or, on a railway, through the negligence of an engine-driver, guard, or signalman, the employer shall be liable notwithstanding the doctrine of common liability. Further, the Workmen's Compensation Act, 1897, compels the payment of compensation for injury sustained in the service, provided it occurred out of and in the course of the employment, and the injury was not attributable to the wilful misconduct of the workman himself.

SILAS ALWARD.

St. John, N.B.

### THE VALUE OF A PREFERENCE SHARE.

The holder of a share in a limited company possesses the right to vote as a shareholder at general meetings of the company. At such meetings, in the absence of special legislation, the number of shares owned by a shareholder is of no consequence, as the majority required is a majority in number of the shareholders present. This is clearly shewn by such cases as *Re Horbury Bridge Co.* (1879), 11 Ch. D. 109; *Ernest v. Loma Gold Mines*, [1897] 1 Ch. 1; *Arnot v. United African Lands*, [1901] 1 Ch. 518. But, as a general rule, either by legislation or by the by-laws of the company, provision is made for the number of votes carried by the shares. Thus there may be given a certain voting power to a group of shares (similar to the provisions in the Ontario Assignments and Preferences Act, and see *Re Stranton Iron Co.* (1873), L. R. 16 Eq. 559), or each share may have attached to it the right to cast one vote in case a poll is demanded. The rule in Ontario is found in s. 63 of the Joint Stock Companies Act, R. S. O. 1897 c. 191, and is as follows :—

“At all general meetings of the company every shareholder shall be entitled to as many votes as he holds shares in the company and may vote by proxy.” This is the rule under the Canadian Companies Act, and also in almost all the Provinces.

The importance of this regulation may be seen by considering such cases as *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, and *Earle v. Burland*, [1902] A. C. 83. In most of the legislation on the subject there is provision for electing the directors by ballot, and where the Act gives one vote for each share held by a shareholder, the control of the company, through the election of its board of directors, will be entirely in the hands of the holders of the majority of the stock, if they combine together. But there has been created in Ontario a special kind of stock called “preference stock,” and by our Joint Stock Companies Act,

s. 22, the directors may create and issue this preference stock, and may give the same "such preference and priority with respect to dividends and otherwise" over ordinary stock as may be declared by the by-law. They may also provide that the holders of this preference stock shall have the right to "select a certain stated proportion of the board of directors," or may give them "such other control of the affairs of the company as may be considered expedient."

This by-law, however, has to be unanimously sanctioned by a vote of the shareholders, present in person or by proxy, at a general meeting of the company, duly called for considering the same, or unanimously sanctioned in writing by the shareholders of the company. Power is given to the Lieutenant-Governor in council to approve of such a by-law, if sanctioned by three-fourths in value of the shareholders of the company.

The holders of this preference stock are in all respects subject to the liabilities of ordinary shareholders, and possess equal rights, though as against the ordinary shareholders they are entitled to the additional preference and rights given by such by-law.

The Companies Act of the Dominion was amended in 1899 by 62 & 63 V. c. 40, and there is now authority given to all the companies governed by the Companies Act to issue preference stock, and powers, very similar to those in the Ontario Act, are included.

Legislation in all the Provinces, except Prince Edward Island, has proceeded upon the same lines: see 61 V. (Q.) c. 39; 56 V. (N.B.) c. 7, ss. 19-20; 63 V. (N.S.) c. 11, s. 70; 60 V. (Man.) c. 3, 1 Edw. VII. (Man.) c. 4, 2 Edw. VII. (Man.) c. 22; R. S. B. C. 1897 c. 44, s. 55; Ord. N. W. T. 1901 c. 20, s. 62.

It is of the utmost importance, of course, that the creation of this stock should be attended with all the formalities required by the statute. These shares cannot be brought into being in any other way than as provided for by statute: see *Colonist Printing Co. v. Dunsmuir*, 32 S. C. R. 679.

Following out the wording of the Ontario statute, there is nothing to prevent the by-law creating this preference

stock from making one-third of the capital stock of the company preference stock, and providing that owners of that stock shall have the right to elect a majority of the board of directors. Section 22 of our statute says in effect that the by-law may so provide. Some technical difficulty may be created by the fact that the shareholders of the company have the right to alter the number of directors, and from the fact that the share capital of the company may be increased or decreased, but the by-law creating the preference stock, if carefully drawn, could provide for these contingencies. It may, as has been stated, give the holders of the shares such other control over the affairs of the company as may be considered expedient. The drafting of an effective clause may, of course, require some ingenuity where the increase of capital is dependent upon the vote of a stated proportion of the capital stock.

The value, therefore, of the preference stock does not reside wholly in the fact that it is entitled to a preference as to dividends. Its possession may practically enable the minority to control the majority through the election of the board of directors.

When the Rock Island re-organization was undertaken in the United States, its underlying principle was that the voting power should be vested in the holders of the preference stock, and much comment was caused by the fact that these represented a minority of the share capital. The course there sketched out may easily be pursued in Ontario. It may be advantageous or it may not. But shareholders in companies, who are asked to vote for the creation of preference shares, should have a clear understanding that by so doing they may deprive themselves of an important element of their voting power.

FRANK E. HODGINS.

Toronto.

## SIR OLIVER MOWAT.

The legal profession will cordially agree in the general expressions of regret which have been called forth by the death of Sir Oliver Mowat, who has gone to his grave full of years and honours. His career should serve as an inspiration to the youth of the country, for it has been one devoted to the public service. The present generation are, of course, accustomed to think of our late Governor principally as a politician, and as one who has been the chief adviser of the Crown in the public affairs of the Province for more than a quarter of a century, and latterly its chief administrator; but the profession will not fail to remember his distinguished career as a lawyer, and it is to that part of his life work that we propose to direct attention. Sir Oliver had a distinguished legal parentage. He began his studies with the late Sir John Macdonald, with whom he remained four years, and then completed his articles with the late Robert Easton Burns, who afterwards was elevated to a puisne judgeship in the Queen's Bench. Sir Oliver was called to the Bar in 1841, and began the practice of his profession at Kingston, his birthplace, but very soon removed to Toronto and entered into partnership with his former principal, Mr. Burns. Mr. Philip Vankoughnet, a future Chancellor, subsequently became a partner of the firm, which was then known as Burns, Mowat, and Vankoughnet. After Mr. Burns's appointment as a Judge in 1848 the firm was continued by the other two partners for a few years, but Mr. Vankoughnet became engrossed in politics, and Sir Oliver formed other connections, at first with the late John Ewart (a brother of his wife's) and then with the late John Helliwell, for many years the solicitor of the Bank of Toronto. Later he was joined by the late John Roaf and William Davis, an English solicitor who immigrated to Canada, and for some years a large business was done by the firm of Mowat, Roaf, and Davis on the north side of Temperance Street. Still later this firm was dissolved, and Sir

Oliver became associated with the present Mr. Justice Maclellan and the late John Downey, who had been a student in the office of Mowat, Roaf, and Davis. In 1855 Sir Oliver was made one of Her late Majesty's counsel. Notwithstanding a very extensive practice, Sir Oliver found time to take part in public affairs, his first essay being as an alderman in the city council of Toronto. In 1857 he entered Parliament as member for North Ontario, and in 1858 became a member of the Cabinet as Provincial Secretary in the short-lived Brown-Dorion Government. In 1863 he became Postmaster General in the Sandfield Macdonald Government, and in the following year he was made Vice-Chancellor of the Court of Chancery for Upper Canada in succession to Vice-Chancellor Esten, deceased.

This appointment was one that was eminently satisfactory to the profession. Ever since the establishment of the Court of Chancery in 1852, Sir Oliver had taken up with the utmost zeal and assiduity the practice of equity, and had become one of the most distinguished practitioners in the Court of Chancery. His name first appears as junior to Mr. Burns on p. 58 of vol. 1 of Grant's reports, and in all the succeeding volumes down to and including vol. 10, his name is found as engaged on one side or the other of most of the cases of any moment. Those were the days when the practice of equity was confined to a comparatively few. His principal contemporaries were his partners, Burns and Vankoughnet, the late Robert John Turner (a brother, by the way, of Lord Justice Turner), Sir Adam Wilson, Secker Brough, Alexander Macdonald, George Morphy, Adam Crooks, R. Cooper, John Crickmore, all of whom he survived many years.

Among his competitors at the Bar were also Sir Henry Strong and Mr. D. B. Read, K.C., who still survive.

Among the earliest of Sir Oliver's professional successes was the case of Greenshields v. Barnhart, 3 Gr. 1, where he succeeded in obtaining, on appeal to the Court of Error and Appeal, a substantial variation of the decree, and the decision in appeal was subsequently affirmed by the Judicial Committee of the Privy Council. In Flint v. Corby, 4 Gr. 45, he was unsuccessful in persuading the Court to grant specific

relief by injunction in respect of saw-logs as being chattels of a peculiar value, on the ground that in the absence of evidence the Court would not presume them to be of "peculiar value." However, he profited by his experience, and succeeded in obtaining for his client such relief in *Stevenson v. Clarke*, 4 Gr. 540; *Fuller v. Richmond*, ib. 657; and *Farwell v. Wallbridge*, 6 Gr. 634, which may be said to have settled the law on this point. One of the most important cases which engaged Sir Oliver's attention while at the Bar was that of *City of Toronto v. Bowes*, which he carried to a successful issue. The suit was brought to make the defendant account for the profits realized from the purchase at a discount of a large amount of the city debentures, which were issued under a by-law of the city, in the passage of which the defendant as mayor of the city had taken an active part. The suit was very vehemently contested, but Sir Oliver was successful at every step, and the judgment of the Provincial Court of Error and Appeal was ultimately affirmed by the Judicial Committee of the Privy Council. This won for the successful counsel great eclat, and thenceforward Sir Oliver's position as one of the leaders of the Equity Bar was assured.

It is not surprising, therefore, that when, at the instance of the late George Brown, it was resolved to attack the validity of the grants made by a former Governor, Sir John Colborne, for the endowment of rectories of the Church of England, Sir Oliver Mowat should be of counsel for the plaintiff in the stubbornly fought suit of *The Attorney-General v. Grasett*, 5 Gr. 412, in which the endowment of the rectory of Toronto was in question, but in this his advocacy was unsuccessful, and the validity of the grant was upheld, both in the Court of Chancery and in the Court of Error and Appeal, 6 Gr. 200. In a subsequent case, where a grant to the Toronto rectory was attacked at the instance of the hospital trustees, Sir Oliver appeared for the defendants, and successfully resisted the claim of the plaintiffs: *Attorney-General v. Grasett*, 6 Gr. 485: and the decree was subsequently affirmed by the Court of Error and Appeal, 8 Gr. 130. Those were the days when the Clergy Reserves had been recently secularized, and the success of that onslaught served but to whet

the appetite of the Reformers for further raids on State endowments. Prior to the establishment of the Court of Chancery there had been no means of enforcing equitable rights, and when that Act was passed a period was prescribed for enforcing such "dormant equities," as they were called.

*Beckit v. Wragg*, 6 Gr. 455, was a suit to enforce a right of that kind, in which Sir Oliver was counsel for the plaintiff, and was successful in the Court of Chancery, but he failed to maintain the decree in the Court of Error and Appeal, 7 Gr. 220.

From the time Sir Oliver entered Parliament his name figures less prominently in the reports, and the men of a more recent generation begin to make their appearance.

While Sir Oliver Mowat was a very successful advocate, it cannot be said that his success was due to any extraordinary oratorical powers. His voice was clear and distinct, but his speech was marked by a certain hesitancy of utterance, and an apparent occasional groping about for the right word, but he knew what he wanted to say, and he was always sound in his law, and consequently always carried weight with the Court, and his success is one instance of many which may be cited—where a man has been a successful advocate without possessing any brilliant oratorical power. Of course before juries the case is different.

As a legislator before attaining the Bench Sir Oliver was the sponsor for the Quieting Titles Act, which has been of some benefit, though perhaps not all that he anticipated, in alleviating some of the troubles and difficulties attending the titles to real estate.

As a Judge Sir Oliver may be pronounced to have been entirely successful. He was eminently fair minded, and conscientious in the discharge of his judicial duties, and never shirked work. In his time the Court consisted of his former partner at the Bar, Philip M. S. Vankoughnet, as Chancellor, and the late John Godfrey Spragge and himself as Vice-Chancellors; it was generally regarded as a strong Court, and it enjoyed the fullest confidence of the profession. While duly maintaining the dignity of his position, Sir Oliver was always approachable, and gave a patient hearing to all



who appeared before him. His judgments were marked by clearness and sound reasoning, and it was seldom that his conclusions were not sustained in appeal. There was a general feeling of regret when in 1872, at the suggestion of his political friends, he determined to leave the serene atmosphere of the Bench, for which he was so eminently fitted, for the strife and turmoil of the political arena. As Attorney-General for the Province and leader of the Government he was responsible for the Provincial legislation for upwards of 25 years, and under his wise and judicious direction many useful measures have been adopted. But as a legislator he always kept a careful eye on the political effect his measures might have, and the writer well remembers that when urged to abolish the right of dower, he significantly remarked that a measure of that kind brought in by the late Hilyard Cameron had cost him his seat at the next election in the county of Peel.

In his Administration of Justice Acts he paved the way for the ultimate passage of the Judicature Act, and though as an old equity lawyer it must have been somewhat of a wrench to do away with the Court of Chancery as a separate tribunal, yet in that, as in other things, he loyally followed the lead of the mother country. Sir Oliver all his life posed as a Liberal and a Reformer; he was in truth and in fact in most things eminently conservative, and was always sincerely desirous of keeping to the old paths whenever there was no vital need of change.

Surrounded as he was by politicians of a less scrupulous type than himself, he nevertheless successfully controlled the affairs of the Province and maintained a reputation for honesty and fairness among all classes of the community. His accession to the gubernatorial chair was regarded as a proper recognition of his merits, and as a fitting reward of his labours as a statesman.

His removal from the scene suggests the question, where is the man amongst us to fill the like role in the future?

## RECENT CASES FROM THE TIMES REPORTS.\*

**Bicycle.**]—The judgment in *Smith v. Kynnersley*, 18 T. L. R. 568, noted 22 C. L. T. 206, that a bicycle was not a "carriage" within the meaning of a toll-bridge Act, was affirmed: 19 T. L. R. 335.

**Carriers.**]—Under the law of England carriers can exempt themselves from liability even for their own negligence, a right somewhat limited as to railway companies by the Railway Act of Canada. *Price and Co. v. Union Lighterage Co.*, 19 T. L. R. 328, shews the necessity for very distinct language in any provision relied on as giving such exemption, and in that case a clause that the carriers would "not be liable for any loss or damage to goods which can be covered by insurance" was held insufficient, though the damage in question might have been insured against.

**Chose in Action.**]—The judgment in *Torkington v. Magee*, 18 T. L. R. 703, noted 22 C. L. T. 294, was reversed by the Court of Appeal: 19 T. L. R. 331. That Court held on the evidence that the plaintiff's assignor had not been in a position to enforce the contract, and that the plaintiff, who, whether he could sue in his own name or not, had no higher rights than his assignor, could not enforce it or obtain damages for its breach.

**Club.**]—*Harrington v. Sendall*, 19 T. L. R. 302, shews the importance of having wide powers of amendment and alteration in the constitution of a club. In default of powers of that kind it was held that the majority of the members of a club could not as against the wishes of a dissentient minority increase the annual subscription.

**Company.**]—In *Mother Lode Consolidated Gold Mines v. Hill*, 19 T. L. R. 341, an agreement by which the directors of a company, upon a shareholder objecting that he had subscribed for shares on the understanding that there was to be

\*Including the cases in No. 19, Vol. 19, week ending 1st April, 1903.

no liability thereon beyond the amount paid on application, assumed to release him from all liability in respect of a large proportion of the shares, was held to be *ultra vires*, and the shareholder to be liable.—Two points of practice are dealt with by the Judicial Committee in the Quebec case of *Kent v. Soeurs de Charité de la Providence*, 19 T. L. R. 345, and both are of application in this Province. The first is that a liquidator appointed under the Dominion Winding-up Act, R. S. C. 1886 c. 129, cannot sue in his own name to recover a debt due to the company, and the second is that upon an objection to his status being taken an amendment should be allowed as a matter of course, no change in the nature of the demand being effected. The liquidator as such would have a right of action in his own name in reference to matters where he represents not strictly the company, but its creditors, but where he is enforcing the rights of the company, the company's name should be used, for its corporate existence is not put an end to till the winding-up is completed.

**Contract.]**—*Newgass v. Bottomley*, 19 T. L. R. 309, seems to have been a somewhat silly dispute about technical rights. The defendant agreed to pay, under a guarantee, a certain sum “against delivery of all securities,” and contended that the securities should have been given to him before liability to pay arose. The plaintiff contended that delivery of the securities and payment of the money were to be concurrent acts, and this contention was upheld.—The decision in *Lawford v. Billericay Rural District Council*, 18 T. L. R. 507, noted 22 C. L. T. 208, that the defendants were not liable to pay for the work done for them, because there was no contract under their seal, was reversed by the Court of Appeal, 19 T. L. R. 322, on the ground that, the work having been accepted, there was an implied contract to pay.

**Domicil.]**—In *re Johnson, Roberts v. Attorney-General*, 19 T. L. R. 309, discusses in an interesting way domicile of origin and domicile of choice. If for any reason the domicile of choice is not legally acquired, the domicile of origin governs.

**False Imprisonment.]**—In *Demur v. Cook*, 19 T. L. R. 327, a gaoler who had detained the plaintiff under the sup-

posed authority of a warrant which was defective on its face, was held liable in damages. The extent of the gaoler's liability is considered. The difficulty was caused by an amendment to the original sentence on appeal to the quarter sessions.

**Fire Insurance.**]—*Workman v. London and Lancashire Fire Ins. Co.*, 19 T. L. R. 360, is a peculiar case as to insurance commissions not likely to be of practical value. A company having large risks to insure had been in the habit of placing the insurance in different insurance companies through an insurance broker, and, hoping to be allowed the commissions themselves, they decided to deal directly with the insurance companies. The discarded brokers persuaded the insurance companies to refuse to deal directly with the company, and thereupon this action was brought against the brokers and the insurance companies for damages for conspiracy, but it was brought not by the company themselves, but by agents who had been instructed to look after their insurance business for them. It was held that these agents could not maintain the action, because they could shew no damage, any commission which they could earn being the property of their principals.

**Fixtures.**]—In *Lyon v. London City and Midland Bank*, 19 T. L. R. 334, chairs let on hire to the occupier of certain premises to be used at public entertainments, each chair being, in order to comply with municipal regulations, fastened in its place by screws, were held not to have lost the character of chattels.

**Life Insurance.**]—*Foster v. Mutual Reserve Fund Life Association*, 19 T. L. R. 342, is a case arising out of the increase of rates some five years ago by the defendant company. The Court of Appeal held that under the policy and constitution there was power to increase the rates, but that the documents circulated by the company were "tricky and misleading," and they therefore decreed rescission of the policy (issued twelve years before), and repayment of all premiums with interest.

**Limitation of Actions.**]—The judgment in *Langrish v. Watts*, 18 T. L. R. 658, noted 22 C. L. T. 297, as to the effect under the Statute of Limitations of a conditional promise to pay, was affirmed by the Court of Appeal, 19 T. L. R. 359, the effect of the correspondence being held to be a promise to pay if the claim on investigation was found to be correct.—In *Kirkland v. Peatfield*, 19 T. L. R. 362, the doctrine of *Sutton v. Sutton*, 22 Ch. D. 511, was held to apply to a mortgage of a reversionary interest in land, and an action on the covenant was held to be barred in twelve years. In view of the provisions of R. S. O. 1897 c. 72, s. 1 (h), it is not necessary to refer to the Ontario cases in which a result contrary to that in *Sutton v. Sutton* has been arrived at.

**Mortgage.**]—The short point decided in *Stevens v. Theatres, Limited*, 19 T. L. R. 334, is that the power of sale in a mortgage is not extinguished by the bringing of an action for foreclosure, and that pending the time for redemption, the power may, with the leave of the Court, be exercised.

**Partnership.**]—Where it is contended that a person not served with the writ in an action against a firm is liable as a partner, the proper form of issue is, so the Court of Appeal decides in *Davis v. Hyman and Co.*, 19 T. L. R. 348, whether the person in question was, or had held himself out as, a partner in the defendant firm.

**Patent.**]—Taking orders in England for goods manufactured abroad and delivered abroad to the purchasers' agents, was held in *Badische Anilin und Soda Fabrik v. Chemische Fabrik Vormal's Sandoy*, 19 T. L. R. 308, to be so far an infringement of the plaintiffs' English patent as to justify an order for leave to serve out of the jurisdiction notice of a writ of summons indorsed with a claim for an injunction.

**Principal and Agent.**]—In *Bartram and Sons v. Lloyd*, 19 T. L. R. 293, there is a clear and useful statement of the rule that if an agent receives without the knowledge of his principal a commission from the person with whom on behalf of his principal he is making a contract, the principal is entitled to repudiate the contract. But the right of repudiation must

be exercised at the earliest opportunity, and in the case in hand the principal was held to have waived the right.—*Tarkwa Main Reef v. Merton*, 19 T. L. R. 367, is the useful complement to the preceding case, based as it is on the principle that an agent cannot hold for his own benefit property obtained by him by means of information gained by him in the course of his employment, which he should have disclosed to his employers.—“The judgment of the Court of Appeal in *Oliver v. Bank of England*, 18 T. L. R. 341, noted 22 C. L. T. 133, as to transfer of shares under forged power of attorney, was affirmed by the House of Lords: 19 T. L. R. 312, sub nom. *Starkey v. Bank of England*.

**Railways.]**—The judgment of the Court of Appeal in *Glasscock v. London, Tilbury, and Southend R. W. Co.*, 18 T. L. R. 295, noted 22 C. L. T. 138, where the plaintiff obtained damages for injuries sustained in stepping from a railway carriage which projected beyond the station platform, was affirmed by the House of Lords, 19 T. L. R. 305, solely on the ground that there was some evidence to support the jury's findings.

**Restriction on Alienation.]**—In *re Fitzgerald's Settlement*, 19 T. L. R. 347, may be referred to because of its recognition of the well settled principle that a prohibition of alienation of property cannot be imposed, except in the case of a married woman's separate property. By the settlement in question—on marriage—property was settled on the husband for life, for his support and without right of alienation or of attachment by creditors, a form of settlement valid by Scotch law, by which it was in vain contended it was governed.

**Sale of Goods.]**—*Holt v. Wren*, 19 T. L. R. 292, is another case as to implied warranty under the Sale of Goods Act, 1893, the article in question being beer. The publican who supplied the beer in question to the plaintiff, was held to be responsible to him in damages because of illness having resulted from the presence of arsenic in the beer, although the plaintiff had not in buying the beer relied on the defendant's skill or judgment, but had bought because of his own

good opinion of the beer brewed at the brewery supplying the beer in question.

**Trade-mark.]**—Kodak Limited v. London Stereoscopic and Photographic Co., 19 T. L. R. 297, contains, to those addicted to the vice of “snap-shotting,” an interesting sketch of the history of the kodak and of films, while for the legal practitioner it decides that “Kodak,” “Brownie,” and “Bull’s Eye” are good trade-marks, not only for cameras of those well-known types, but also for the films therefor manufactured by the plaintiffs. “Panoram” was, however, held to be a descriptive word, and not capable of registration as a trade-mark.—Fels v. Thomas Hedley and Co., 19 T. L. R. 340, is a similar case, the name “naptha” as applied to soap being held to be descriptive, and not to have acquired in the market a meaning denoting only the plaintiff’s soap.

**Trust.]**—In Jackson v. Dickinson, 19 T. L. R. 350, a trustee was held entitled to recover from the estate of his deceased co-trustee one-half the amount of a loss on an unauthorized investment, the facts shewing in effect an agreement between the two trustees to take the risk resulting from the breach of trust, and to share the loss if any should result.

**Will.]**—Betts v. Gannell, 19 T. L. R. 304, was a contest as to the execution of a will. The testator signed the will in the presence of the witnesses, who then signed it in an adjoining room, the door being open, but they not being in view of the testator. Probate was refused. It may be noted as an incidental point that some beneficiaries who appeared were refused costs out of the estate, which were allowed, however, to the executors and the next of kin.

## EDITORIAL REVIEW.

**Death of Sir Oliver Mowat.**

We refer elsewhere to the death of Sir Oliver Mowat, K.C.M.G., Lieutenant-Governor of Ontario, who had a distinguished career on the Bench and at the Bar, as well as in public life. His death occurred on Sunday the 19th April.

Before proceeding with the business of the Court of Appeal on the following day the Chief Justice of Ontario addressed the Bar as follows :—

We meet this morning in the shadow of a great sorrow. With the rest of his fellow-citizens and fellow-countrymen, we mourn the death of Sir Oliver Mowat, the Lieutenant-Governor of the Province. He has been such a prominent and central figure in the life of the Province and of the Dominion for so many years, that his removal by death from the sphere of his many activities must stir the thoughts and emotions of all in an unusual degree. He has passed away crowned with many honours won in the service of his country, but distinguished even more by the esteem, admiration, and affection of his fellow-men. We venture no attempt to render an adequate tribute to the work, the achievements, or the virtues of this truly good and therefore truly great man. To review his career would be to review the history of the Province for more than half a century. We who knew him as a lawyer and a Judge can perhaps most justly appreciate the value of the services he rendered to his native Province in that capacity. His luminous judgments, rendered while Vice-Chancellor, still remain to guide and instruct the lawyer, the Judge, and the student of the present day, while the result of his labours as a law reformer stands in the statute books as an enduring monument to his fame. The record of his work as a public man, a legislator, and a statesman, speaks for itself, and it may be safely intrusted to the historian and the chronicler of the time. All classes will honour and cherish the memory of the man, remembering



most his kindness of heart, his genuine goodness, his sterling honesty and uprightness of character, his anxious desire for the good of his fellow-beings, and his sincere Christian piety. In him the Province loses a devoted lover of his country and a true friend of its people. To his family we offer our earnest and respectful sympathy.

#### **The New Lieutenant-Governor.**

With unusual and commendable celerity the Dominion Government on the 8th April appointed to the office of Lieutenant-Governor of Ontario, in the room of Sir Oliver Mowat, Mr. William Mortimer Clark, K.C., a Toronto barrister. It is noticeable that all the Governors since Confederation, save three, have been members of the Bar. Mr. John Crawford was the first lawyer to occupy the office. He was followed by Mr. John Beverley Robinson, Sir Alexander Campbell, Sir George Kirkpatrick, Sir Oliver Mowat, and now by Mr. Clark. The non-legal Governors were Major-General Stisted, Sir William Howland, and Mr. Donald A. Macdonald. Mr. Clark is probably not well known outside of Toronto except as a prominent and able member of the Presbyterian General Assembly; but no member of the Toronto Bar is more highly respected by his brethren. His appointment was rather a surprise, as we have been accustomed to look for Governors to another class of the community—men who have been in active political life. There is every reason to believe, however, that the new Governor will discharge the constitutional and social functions of his office with credit. He is a man of solid parts, a reader and a thinker; he has sagacity, urbanity, and dignity; and it is safe to predict that he will be a constitutional vice-ruler, and a favourite with the people of Ontario.

#### **Death of Mr. Justice Lount.**

We record with profound regret the death, on Friday the 24th April, of the Hon. William Lount, one of the Judges of the Common Pleas Division of the High Court of Justice for Ontario. His demise was not unexpected, as it was known that he was the victim of an incurable malady; but hopes were entertained of his life being prolonged; and he

sat on the Bench with the Royal Commissioners who are investigating the Gamey charges, on one day of the week before his death. Mr. Lount had a distinguished career at the Bar, and was held in very high esteem by his brethren. He was for so short a time on the Bench, having been appointed only in January, 1901, that more cannot be said than that he gave promise of being an excellent Judge. *Vidimus tantum*. Chief Justice Falconbridge, in a public expression of regret, said: "The amiability and sweetness of disposition of William Lount were so marked as to be the subject of observation by the most casual acquaintance, and were such as to endear him to his brethren at the Bar and his brethren on the Bench. And those lovable qualities were accompanied and balanced by an equal and judicial equipment of mental faculties."

#### **Vacancies on the High Court Bench.**

There are now two vacancies in the High Court of Justice for Ontario, Mr. Justice Robertson having, as was expected, retired from the Bench upon the expiration of his leave of absence. It is to be hoped that new Judges will be appointed at once, as the business of the High Court is somewhat in arrear.

#### **Death of Three County Judges.**

Recently the deaths of three more Judges of County Courts in Ontario were recorded—Judge Creasor, of Grey, Judge Wilkinson, of Lennox and Addington, and Judge Mac-Millan, of Haldimand. Mr. W. J. Hatton, barrister, of Owen Sound, has been appointed to succeed Judge Creasor. The other vacancies have not yet been filled.

#### **Appointments to Office.**

During last month several important appointments were made in Ontario. Mr. John Winchester, K.C., Master in Chambers of the High Court of Justice, was appointed senior Judge of the County Court of York by the Dominion Government, and Judge of the Surrogate Court of the county, by the Ontario Government. Mr. Winchester has been elevated to a very important position, and there can be no doubt that he will fill it with credit. There has been a general chorus

of approval of the action of the Governments in promoting a highly esteemed public servant. The occupant of the two offices is supposed to be better paid than any Judge in Canada, though it is said that a larger share of the Surrogate fees will henceforth go to the junior Judges of the County Court. We congratulate Judge Winchester on his elevation. Those who have watched his career know that he has been steadily growing as a lawyer and a man of affairs, and it will be surprising if he does not gain, as did his distinguished predecessor, the late Judge McDougall, the complete confidence of the community.

The place of Master in Chambers has been given to Mr. James Strachan Cartwright, Registrar of the Court of Appeal; and Mr. John A. McAndrew, Inspector of Legal Offices, has been made Registrar of the Court of Appeal. These are excellent appointments. Mr. J. W. Mallon, a Toronto barrister, becomes Inspector of Legal Offices. He is a young and unknown man, but is well spoken of as regards ability and integrity.

We have the same remark to make about the appointment of Mr. Hatton as Judge of the County Court of Grey, that we made a short time ago on the appointment of a new Judge in another county—that it would be better to stick to the rule of making appointments outside the county. There is no rule without an exception, but when there are so many exceptions, the rule is lost sight of. This remark does not, of course, apply to the metropolitan county of York, where the former associations of a Judge with members of the Bar and litigants cannot be supposed to be of the same character as in a smaller place.

#### **Breach of Warranty on Sale of Goods.**

The case of *McMillan v. Dick & Co.*, decided by Lord Kincairney in the Outer House on the 12th February last (10 Sc. L. T. Rep. 631), is one of several recent illustrations of the operation of s. 14 of the Sale of Goods Act, 1893. Thus in *Priest v. Last* (24th February, 1903, 19 Times L. R. 278), Mr. Justice Walton held that an india-rubber hot-water bottle, which on the fifth day of its use had burst and scalded

the plaintiff, was not reasonably fit for the purpose for which it was intended, and that the plaintiff was entitled to damages for breach of the implied warranty contained in s. 14 (1) of the Act. The hot-water bottle was bought in the shop of a retail chemist and druggist, and, being a specific article purchased and carried off by the buyer without any negligence being substantiated against the seller, the judgment imposes a very serious responsibility upon shopkeepers. A similar case related to beer purchased for immediate consumption at a tied public-house (*Wren v. Holt*, 3rd March, 1903). The beer contained arsenic, which caused illness from arsenical poisoning, and, although the jury found that the plaintiff did not buy the beer in reliance on the skill or judgment of the defendant, they also found that the plaintiff relied on the good name of the beer brewed by the particular brewery. On this ground the Court held that there had been a breach of an implied warranty. In the Scotch case, *McMillan v. Dick & Co.*, the pursuer purchased from the defenders certain quantities of their "patent anti-fouling composition" and of their "anti-corrosive composition." No special warranty was given, but the Lord Ordinary had no doubt that the defenders or their agents were perfectly aware of the pursuer's intention to paint his vessel, the *Vortigern*. The pursuer's case was that, through some unexplained defect, the defendant's composition all came off in one night, and that the old paint was damaged by the application of the new paints. The Lord Ordinary assoilzied the defenders on the ground that they were relieved by the proviso attached to s.-s. (1) of s. 14 of the Act, which provides "that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose." Lord Kincairney was of opinion that, though "the equity of this proviso may not be obvious to everyone, it appears to meet this case precisely and to negative the pursuer's claim." —*London Law Times*.

#### Addressing the Court.

Mr. Balfour's amusing error of a two-fold character in debate on the second reading of the Church Discipline Bill.

in addressing the members of the House of Commons instead of Mr. Speaker, and in designating his audience as "My Lords," has several precedents in the speeches in that assembly of members of the Bar. The late Mr. Richard R. Warren, who was for a generation President of the Probate and Matrimonial Division of the High Court of Justice in Ireland, in speaking in the House of Commons in 1868, as Irish Attorney-General, against Mr. Gladstone's resolutions in favour of the disestablishment and disendowment of the Irish Church, addressed his audience as "Gentlemen of the jury." Mr. Justice Kenny, when speaking in Committee of the House of Commons on the Home Rule Bill in 1893, committed the slip pardonable in a man with a large equity practice at the Irish Bar, and accustomed to argue a case before one Judge, of addressing Mr. Mellor, the Chairman of Committees, as "My Lord." The lapsus linguæ was received with good-humoured laughter, and Mr. Kenny was requested by a brother barrister, sitting on the other side of the House, to apply for the costs of his motion. Mr. Bodkin, K.C., of the Irish Bar, who sat in the House of Commons of 1892-1894, has often been accused of having addressed Mr. Speaker Peel as "Your Reverence." He really said: "I submit, sir, with reverence." None of these (related by the *London Law Times*), however, is equal to the slip of a Roman Catholic barrister in Toronto a few years ago, who addressed the Judge on the Bench as "Your Grace."

#### **Selected Bar Anecdotes.**

The following letter is said to have been actually written and sent by an advocate in Montreal to a citizen:

To .....

Dear Mister,—I have the honour to tole you that the Reverend Messieurs of the Seminary have ordained me with instructions to poursuivre you for the scandalous nuisance that was caused to that vicinity by the paroquet which you have on your residence when was make much abominable fracas.

The Reverend Messieurs are interfered with in their devotions, and when the band of the Grande Seminary of 111

pupils begin for play and your dam paroquet was begin screech, it is dreadful. Also, one of the neighbours on the same street with your self was very mad and can't sleep on the afternoon, and when he go for play the piano your bird yell and spoil his improvisations. Altogether you must put away that bird. Please give me some undertaking without delay, otherwise I must institute the procedures.

Receive the assurance of my considerations.

Your obedient servant,

(Signed) \_\_\_\_\_

Many years ago a County Judge who had gone from home for his health was erroneously reported dead, and an eager aspirant to the supposed vacancy actually got an appointment to it before the vacancy existed. An old lawyer to whom the facts were told, drily remarked that Judge —— ought to die *nunc pro tunc*.

#### **Recent American Decisions.**

*Contract.*—An employee of a glucose manufacturer, knowing the secret processes of the business, is held, in *Harrison v. Glucose Sugar Refining Co.* (C. C. App. 7th C.), 58 L. R. A. 915, to be properly enjoined from violating his contract not to enter the employ of a rival manufacturer during his term of employment.

*Damages.*—Punitive damages for wrongful refusal to honour a cheque are held, in *American Nat. Bank v. Morey* (Ky.), 58 L. R. A. 956, not to be allowable, in the absence of actual malice, oppression, or bad motive on the part of the bank.

*Defamation.*—A clergyman who enters upon the baptismal record of his church the name of a person as the reputed father of a bastard child, knowing that he has been acquitted of that charge, is held in *Kubricht v. State* (Tex.), 58 L. R. A. 959, to be guilty of libel.

*Husband and Wife.*—A husband's common law liability for his wife's torts is held, in *Henley v. Wilson* (Cal.), 58 L.

R. A. 941, not to be changed by statutes preserving to her her separate estate and empowering her to manage it.

*Insurance.*—That a debt has become barred by the Statute of Limitations is held, in *Connecticut Mut. L. Ins. Co. v. Dunscomb* (Tenn.), 58 L. R. A. 694, not to defeat the creditor's right to enforce payment of a policy of insurance in his favour on the debtor's life.

Under a contract to purchase real estate and pay the purchase price in instalments, which provides that the purchaser shall keep the property insured for the benefit of the vendor, it is held, in *Naquin v. Texas Savings and R. E. Invest. Assn. (Tex.)*, 58 L. R. A. 711, that the purchaser cannot, in case of injury to the property by fire, insist that the insurance money shall be applied in reduction of the indebtedness not yet due, when its amount, added to the value of the lot, does not equal the unpaid purchase money, but the vendor is held to have the right to apply it in restoring the property for the protection of its security.

A provision of a fire insurance policy rendering it void if gasoline is kept, used, or allowed on the premises, is held, in *Springfield F. and M. Ins. Co. v. Wade (Tex.)*, 58 L. R. A. 714, not to be violated by bringing a gallon of it upon the property for temporary use, although such act results in the destruction of the property.

*Island in Stream.*—An island formed in a navigable river is held, in *Holman v. Hodges (Iowa)*, 58 L. R. A. 673, not to become a part of the land of an adjacent riparian owner, when it was formed independently of any accretions to his land, and when any additions to his land, whether by accretions thereto or the receding of the waters, have resulted from the formation of the island. Title to islands is the subject of a note to this case.

*Marriage.*—To be sealed for time and eternity by a sealing ceremony in accordance with the law of the Mormon Church is held, in *Hilton v. Roylance (Utah)*, 58 L. R. A. 723, to be a good common law marriage.

*Master and Servant.*—An employee is held, in *Monteith v. Kokomo Wood Enamelling Co. (Ind.)*, 58 L. R. A. 944, to have a right of action for injuries caused by his master's failure to comply with his statutory duty to guard a circular saw, although the defect was obvious.

*Nuisance.*—A judgment entered in an action for the abatement of a nuisance is held, in *Gilbert v. Boak Fish Co. (Minn.)*, 58 L. R. A. 735, to be a bar to a subsequent proceeding for damages based upon the same facts. With this case is a note considering the question, Does an adjudication respecting the abatement of a nuisance bar an action for damages therefor?

*Telegraph.*—A telegraph company is held, in *Western U. Teleg. Co. v. Cobb (Tex.)*, 58 L. R. A. 698, not to comply with its duty to deliver promptly a telegram, by delivering it to the clerk of the hotel where the addressee boards, where the clerk had no other authority to receive it than that which arises from the relation of hotel-keeper and boarder.

18 *Way—Poles and Wires.*—The placing of telephone poles and wires in a city street is held, in *Donovan v. Allert (N. D.)*, 58 L. R. A. 775, to be a new burden or servitude thereon, requiring compensation to be paid to abutting owners.

✓ The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric-light cable lines and wires for the purpose of furnishing light and energy to private takers, is held, in *Callen v. Columbus Edison Electric Light Co. (Ohio)*, 58 L. R. A. 782, to be a taking of the property of the abutting owners.



## CORRESPONDENCE.

**Bar Etiquette.**

*To the Editor of the Canadian Law Times.*

Sir,—Is any attention paid by the lecturers at the Law School to the instruction of students in Bar etiquette or respect and courtesy to the Bench? Judging by a recent episode in the Stratton-Gamey investigation, some members of the junior Bar are in need of information in such matters. On Monday the 6th April, a solicitor engaged in the case replied to an order of the commissioners, Sir John Boyd and Chief Justice Falconbridge, by depositing with the Registrar at 4.30 p.m. an affidavit on production. This was accompanied by a letter addressed to the Registrar with information for himself and their lordships. Copies of the letter, however, might have been obtained by their lordships an hour earlier in the day by spending one cent in the purchase of an evening paper, which contained it in full. My own recollection of the Law School is that no instruction was given on the propriety of such a course as is indicated by these facts, and as a practitioner I have been left to follow my individual instincts, and the text books on property in letters.

R.

## BOOK NOTICES.

**Mews's Annual Digest, 1902.**—The Annual Digest of all the Reported Decisions of the Superior Courts, including a Selection from the Scottish and Irish, with a Collection of Cases Followed, Distinguished, Explained, Commented on, Overruled, or Questioned, and References to the Statutes passed during the year 1902, by John Mews, Barrister-at-law. London: Sweet & Maxwell, Limited; Stevens & Sons, Limited: 1903.

This digest maintains its excellent standard.

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**General Digest, American and English,** Bi-monthly Advance Sheets, February, 1903. Rochester, New York: The Lawyers' Co-operative Publishing Co.

We have had occasion to refer to this digest before. It covers an immense field, but the notes are admirably condensed.

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**American Bar Association.**—Transactions of the 25th Annual Meeting, held at Saratoga Springs, New York, 27th 29th August, 1902. Philadelphia: Dando Printing and Publishing Co.

The proceedings are, as usual, full of interest to lawyers.

# THE CANADIAN LAW TIMES.

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JUNE, 1903.

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## DOWER IN MORTGAGED ESTATES.

**W**HAT were the rights of a dowress who joined in a mortgage prior to the Act giving dower in equitable estates (now R. S. O. c. 164, s. 2)? This question seems to have been the subject of a good deal of difference of opinion, one opinion being that the bar of dower in a mortgage, though absolute in form, was yet very much in the position of the conveyance of the legal estate by the husband, and still left in the wife an equitable title to dower, in respect of which she had an equity of redemption. To this effect were the decisions in *Thibodo v. Collar* (1850), 1 Gr. 147; *Forrest v. Laycock* (1871), 18 Gr. 611; *Jackson v. Parker*, Amb. 687; *Innes v. Jackson*, 1 Bligh 126; and the opinions of text writers: *Park on Dower*, p. 212; *Powell on Mortgages*, 675; *Roper's H. & W.*, 2nd ed., by Jacob, 536; *Bright's H. & W.*, 525. Notwithstanding these authorities it was the uniform practice in Chancery not to join the wife of a mortgagor as a party to proceedings against her husband for the sale or foreclosure of the mortgaged property.

In *Dawson v. Whithaven* (1877), 6 Ch. D. 218, however, all of the English cases and opinions above referred to were reviewed and considered by the English Court of Appeal (Jessel, M.R., and James and Cotton, L.JJ.), an exceptionally strong Court, and the conclusion was reached that the bar of dower in a mortgage was absolute, and left no right, legal or equitable, in the wife; the cases on which *Mowat, V.-C.*, relied in *Forrest v. Laycock* being held to turn on the fact that in these the equity of redemption was by the terms of the mortgage expressly limited to the wife as well as her

husband, which was held to give her a right of redemption which otherwise she would not have had.

The conclusion thus reached by the English Court of Appeal had been anticipated in this Province by the decision of Spragge, C., in *Black v. Fountain* (1876), 23 Gr. 174, where it was held that after a wife had joined to bar her dower in a mortgage, she had only under the statute dower in the equity of redemption, which was subject to be barred by alienation by the husband alone, and that her release of this right was no consideration for a conveyance to her, as against the creditors of her husband. And the correctness of the law as laid down in *Dawson v. Whithaven*, as to bar of dower in a mortgage prior to the law giving dower in equitable estates, is recognized by Proudfoot, V.-C., in *Re Robertson*, 25 Gr. 277-279, and also by the full Court on rehearing in the same case, *ib.* 486.

But it was also considered in those cases that the statute giving a wife dower in the equitable estates of which her husband died seised (R. S. O. c. 164, s. 2) had the effect of modifying the effect of a bar of dower in a mortgage to this extent, that the wife's right to dower (notwithstanding the bar) attached to the equity of redemption, provided her husband died seised of it. Thus Proudfoot, V.-C., in *Robertson v. Robertson*, 25 Gr. 500, says: "Where the husband executes a second mortgage, and therefore necessarily of the equity of redemption, the wife is bound by the incumbrance, not by virtue of the bar of dower in the first mortgage, but by virtue of the statute which gives her dower in that equitable estate only of which the husband dies seised. If he had chosen to alien the entire equity, she would have no dower, and if he mortgages, it is a partial alienation, which doubtless for that reason would effectually bind her:" and he quotes an observation of Esten, V.-C., in *Smith v. Smith*, 3 Gr. 451, 452, to the same effect. *Robertson v. Robertson* was followed by Spragge, C., in *Fleury v. Pringle*, 26 Gr. 67.

Therefore we may conclude before the Act of 1879 (42 V. c. 22, now R. S. O. c. 164, s. 7) the law relating to this part of the law of dower stood as follows.

A wife joining in a mortgage of her husband's legal estate in lands to bar dower, in effect converted her right of dower in the legal estate into a right of dower in the equity of redemption, but this right might be defeated wholly or in part either by an absolute conveyance, or a conveyance by way of mortgage of the husband alone. This operated hardly on wives, inasmuch as if a wife should execute a mortgage containing a bar of dower, her right of dower in the equity of redemption was then practically at the mercy of her husband.

It was to remedy this condition of things that the Act of 1879 was passed (now R. S. O. c. 164, s. 7).

It provided that thereafter "no bar of dower contained in any mortgage . . . upon real estate shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument."

The second section provided that "In the event of a sale of the land comprised in any such mortgage or other instrument under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee to the same extent as she would have been entitled to dower in the land from which such purchase money shall be derived had the same not been sold." These provisions are now embodied in R. S. O. c. 164, s. 7.

Very shortly after the passing of the Act its effect was considered by Patterson, J.A., in *Martindale v. Clarkson*, 6 A. R. 1, although, it is true, the opinion he expressed was obiter. He thought that one of two constructions of the statute must prevail: "Either that it confers the right of dower out of such an equity of redemption of which the husband does not die seised, in all cases, whether he loses it by his own direct conveyance, or it is sold under power of sale or legal process; or that the new right is confined to cases of the latter class, which are those for which ss. 2 and 3 provide certain procedure."

In *Calvert v. Black*, 8 P. R. 255, Galt, J., adopted the latter alternative, but this decision was disapproved by Armour, C.J., in *Pratt v. Bunnell*, 21 O. R. p. 2, and although his decision as to the quantum of dower proper to be allowed in that case was reversed by a Divisional Court, yet his opinion as to this point does not seem to have been dissented from. In that case Armour, C.J., says: "The effect of the statute is to treat a wife joining in a mortgage containing a bar of dower made by her husband of his real estate as mortgaging her inchoate right of dower as surety for her husband." This appears to be a third construction, and a preferable exposition of the meaning of the statute to those suggested by Patterson, J.A. If we may be allowed to paraphrase what the learned Chief Justice has said, it would appear to amount to this, that whereas formerly the bar of dower was absolute for all purposes, hereafter it was to be absolute only for the purpose of giving effect to the rights of the mortgagee, but for all other purposes it was subject to the like equities as the mortgagor possessed in the mortgaged land, notwithstanding his conveyance of the legal estate. In short, the inchoate right of dower was mortgaged and no longer absolutely released, except so far as was necessary to give effect to the rights of the mortgagee. The effect of this is, apparently, to preclude the husband from dealing with the equity of redemption so as to defeat the right of his wife to dower therein without her concurrence, because quoad the equity of redemption her dower was not barred by the release contained in the mortgage (except for giving effect to the rights of the mortgagee), and it would seem, moreover, to resolve in favour of the wife the much agitated question as to whether a wife who bars her dower in a mortgage of her husband's lands is entitled to redeem (see the cases referred to in *Dawson v. Whithaven* (1877), 6 Ch. D. 218), and this though there be no express limitation of the right to redeem in her favour expressed in the mortgage: see *Blong v. Fitzgerald*, 15 P. R. 467; *Building and Loan Assn. v. Carswell*, 8 P. R. 73 (but see contra, *Casner v. Haight*, 6 O. R. 451).

It is true that an inchoate right of dower is not an estate in the land, it is at best a future right contingent on the wife

surviving her husband, and does not even then become an estate until actual assignment. But notwithstanding this the Legislature appears by the Act of 1879 to have regarded this right as a substantial interest in the land, and capable of being dealt with as though it were in fact an estate.

This appears to have been the opinion of Boyd, C., in *Re Croskery*, 16 O. R. 207, where he points out that the effect of R. S. O. c. 164, s. 7, is to draw a clear distinction between a wife's right to dower in an equitable estate given by s. 2 of that Act, as to which her rights accrue only at her husband's death, and a wife's dower in a legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue or enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage: see also *Morris v. Martin* (1890), 19 O. R. 564; and cf. *Black v. Fountain*, *supra*.

Prior to the Act of 1879 the former Court of Chancery had decided that where the bar of dower is given in a mortgage to secure the purchase money of the mortgaged estate, which mortgage remains unpaid when the right of dower matures, the dower is to be calculated only on the basis of the value of the equity of redemption or the surplus which remains after the payment of the mortgage debt: *Campbell v. Royal Canadian Bank*, 19 Gr. 334. This case, it appears, was subsequently affirmed by the Court of Error and Appeal (see per Proudfoot, V.-C., in *Robertson v. Robertson*, 25 Gr. at p. 497). But where the mortgage was given to secure a debt of the husband, her dower was to be calculated on the whole value of the mortgaged estate, and not merely the surplus of the payment of the mortgage debt: *Re McMorris*, 8 C. L. J. 284; *Doan v. Davis* (1876), 23 Gr. 207; *Lindsay v. Lindsay* (1876), 23 Gr. 210; *Re Robertson*, 24 Gr. 442; S. C., 25 Gr. 276, 486.

Where, however, the estate mortgaged was merely an equity of redemption, the widow's dower is confined to the value of such equity: *Thorpe v. Richards*, 15 Gr. 403.

The right of the widow to dower in lands respecting which she has joined in a mortgage for her husband's benefit was held to be paramount to the claims of the creditors of her

husband after his decease, other than the mortgagee: see *Sheppard v. Sheppard*, 14 Gr. 174; *Thorpe v. Richards*, 15 Gr. 403; *Robertson v. Robertson*, 25 Gr. 486: and the latter decision, having been pronounced by the full Court, may be taken to overrule the contrary decisions of *Mowat, V.-C.*, in *White v. Bastedo*, 15 Gr. 546, and *Baker v. Dawbarn*, 19 Gr. 113.

The question of the quantum of dower to which a widow is entitled has since the Act of 1879 been two or three times under discussion in the Courts. In *Pratt v. Bunnell* (1891), 21 O. R. 1, *Falconbridge and Street, JJ.*, overruling *Armour, C.J.Q.B.*, came to the conclusion that, even though the wife joined in a mortgage to bar her dower for her husband's benefit for a debt, not being purchase money of the mortgaged estate, she was only entitled to dower in the surplus computed on the amount of such surplus, and not on the gross value of the estate mortgaged. In coming to this conclusion they not only reversed the decision of *Armour, C.J.Q.B.*, but the opinions of *Patterson, J.A.*, in *Martindale v. Clarkson*, 6 A. R. 1, and of the Chancellor in *Re Croskery*, 16 O. R. 207, and of *Ferguson, J.*, in *Re Hague*, 14 O. R. 660, and also the numerous other cases above referred to on this point. The decision in *Pratt v. Bunnell*, however, was not followed in *Gemmill v. Nelligan*, 26 O. R. 307, and the subsequent statute 58 V. c. 25, s. 3 (now R. S. O. c. 164, s. 8), has given legislative sanction to the view adopted in *Gemmill v. Nelligan*.

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## THE EVOLUTION OF LOCAL TAXATION IN ONTARIO.

### I. EARLY LOCAL GOVERNMENT.

The Quebec Act, 1774, by which the Province of Quebec was established or redefined, included in the new Province the whole of what is now Ontario. In the country west of the river Ottawa no considerable settlement of English-speaking people had been made, and local government was not required, but s. 13 of the Act, recognizing the possible need of local rates and taxes, provided that the Legislative Council created by the Act should not impose any taxes or duties, "such rates and taxes only excepted as the inhabitants of any town or district within the said Province may be authorized by the said Council to assess, levy, and apply within the town or district for the purpose of making roads, erecting and repairing public buildings, or for any other purpose respecting the local convenience and economy of such town or district." For the levying of such local rates and taxes, however, down to the time of the establishment of Upper Canada, no machinery was provided.

The expenses of the general civil government were met largely by duties on brandy, rum, and other spirits, molasses and syrups. Up to 1775 the duties imposed by His Most Christian Majesty (the French King) appear to have continued, but by the Quebec Revenue Act, 1774 (14 Geo. iii. c. 88), a re-arrangement of duties was made in which was betrayed a fine British, but scarcely an Imperial, sentiment, the duty being 3d. for every gallon of spirits of the manufacture of Great Britain, 6d. a gallon if imported from the West Indies, and 9d. a gallon if imported from the American colonies.

Considerable revenue was also probably derived from licenses to keep houses of public entertainment and for retailing spirituous liquors. The duty for such licenses was £1 16s., and a penalty of £1 payable to the Receiver-General

was imposed for keeping such a house, or retailing liquors, without a license.

Territorial or casual revenues payable to the French King, and after the conquest to the King of England, were not affected by the Act.

Local revenue, so far at all events as the territory now Ontario is concerned, was not needed; the only expenses connected with that part of the Province were probably the administration of justice and the making of roads, matters both in the hands of the general government.

Under the Quebec Act some ordinances of a local municipal character were passed, but naturally these were chiefly directed to the needs of the easterly and more settled districts, and from 1774 to 1791 the territory which afterwards became Upper Canada may be said to have had no municipal government or local taxation. The making of new roads through ungranted districts was the work of the general government, and the making and repair of roads in the settled districts was required to be done by the actual labour of the owners of land and settlers. The supervision of road matters was, under the ordinances, in the hands of captains of militia; and the Justices of the Courts of Common Pleas on their circuit visits were required to see that roads and bridges were in repair in accordance with the ordinances. Later this supervisory jurisdiction was transferred to the Justices of the Peace in Quarter Sessions. The terms of these ordinances were not applicable to the actual conditions of what afterwards became Upper Canada.

The next era begins in 1791 with the establishment of Upper Canada. By that date the huge Province of Quebec had shewn symptoms of unwieldiness. The general increase of population and the growth of English-speaking settlements along the shores of the western lakes, consisting in great part of United Empire Loyalists, were rendering more and more manifest the inappropriateness in the western territory of the existing constitution. For the purpose of the administration of the criminal law Justices of the Peace were appointed, but no local administration of municipal affairs appears to have been effected by their means.

For the civil administration of justice there were the Courts of Common Pleas established by ordinance passed under the Quebec Act (17 Geo. iii. c. 1); and a Superior Court, the Court of King's Bench, held sittings at Montreal. After some years, by ordinance of 30th April, 1785 (25 Geo. iii. c. 5), provision was made for the holding also of Courts by two Justices of the Peace in the more remote parts of the Province for the determination of causes involving sums between 40s. and £5.

In all such Courts the law administered was the law of Canada, and the necessity for resorting to Montreal, as the judicial centre, in an age when communication was difficult and slow, soon became a sensible inconvenience. Both these circumstances became every year an increasing grievance in the eyes of settlers who had established themselves along the western lakes remote from Montreal, and were accustomed to, and had, in fact, in some districts locally assumed, British law. Agitation for the relief of these grievances produced at length, in 1791, the Constitutional Act (31 Geo. iii. c. 31).

That Act recited the Royal intention to divide the Province of Quebec into two separate Provinces, and proceeded to provide a constitution for the new Provinces. No provision was by it made for local administration or taxation, and no change was made in the methods of administering civil and criminal justice. Such matters were left to be dealt with by the Governors or Lieutenant-Governors of the Province, acting by and with the advice of the Legislative Council and Assembly, provided for by the Act, except that the Governor, or Lieutenant-Governor in Council, was constituted a Court of Appeal for hearing appeals in like causes as might under the Quebec Act have been heard by the Governor in Council in the former Province of Quebec (s. 34).

By Imperial Order in Council of August, 1791, the Province of Quebec was accordingly divided into two Provinces, Upper Canada and Lower Canada, and by Royal proclamation, which took effect within each Province on 26th December, 1791, Upper Canada was declared to consist of that part of the former Province of Quebec (as modified in 1783 by the treaty made at the conclusion of the war with the American

colonies) which lay to the west of what is to-day the boundary between Quebec and Ontario.

On the 16th July, 1792, the Lieutenant-Governor of Upper Canada, John Graves Simcoe, by proclamation divided Upper Canada into nineteen counties. These counties were, however, not for municipal purposes, but for the purpose of supplying representatives in the Legislative Assembly of the new Province, and the same proclamation gave to the nineteen counties sixteen members.

The first Parliament of Upper Canada was held in the same year, 1792, at Newark (afterwards Niagara), and sat between 17th September and 14th October of that year. The Acts of the first session introduced the law of England in regard to property and civil rights, and trial by jury, and provided for other of the more pressing needs of the Province, chiefly in regard to the administration of justice. In 1793 provision was made, for the first time, for general annual assessments throughout the Province, and for the raising locally and regularly of revenue to meet local expenditure. The conflict between Tory and Democrat as to the principles to be adopted in local government, though not very openly shewn or very sharply defined, had the effect of causing nothing to be done except the passing of a somewhat colourless Act (33 Geo. iii. c. 2) respecting the appointment of parish and town officers. It is interesting as shewing the extremely simple municipal needs to meet which it was thought sufficient for the time being. On the summons of two Justices of the Peace for the division "the inhabitant householders paying or liable to pay to any public assessment or rate of any parish, township, reputed township or place," were authorized to assemble and elect the following officers: (1) A clerk, who was required to make and return to the Sessions a complete list of the male and female inhabitants of the parish, and to enter and record such matters generally as related to the parish, etc.; (2) two assessors; (3) a collector; (4) an overseer of highways; (5) a pound-keeper; (6) two wardens. The wardens were to be chosen for the parish, township, reputed township or place, but as soon as there should be any church built for the performance of divine service according to the use

of the Church of England, with a parson or minister duly appointed thereto, then the inhabitant householders were to choose one person, and the parson or minister one other, which two persons were jointly to serve the office of churchwarden. It was further provided (s. 7) that such town wardens or churchwardens and their successors duly appointed should be as a corporation to represent the whole inhabitants of the township or parish, and as such they were declared to have a property in the goods or chattels of or belonging to the parish, and were required to prosecute or defend in all presentments, indictments or actions for or on behalf of the inhabitants of the parish.

Such organization of a parish or other locality was only authorized in case there were thirty inhabitant householders. Where there were less than thirty, they were to be joined to and taken to be inhabitants of the township adjacent thereto which contained the smallest number of inhabitants.

The Justices in Quarter Sessions assembled appointed a high constable and such ordinary constables as were required.

The records in the offices of the various clerks of the peace in the Province must preserve interesting details of the various matters of municipal administration which were necessary in those primitive days, and were attended to by the Justices in Sessions.

By the kind permission of Mr. Irwin, Clerk of the Peace for the county of York, I have been enabled to examine the minute books of the Quarter Sessions of the Peace for the Home District and other records preserved in his office. Amongst the records are abstracts of assessment rolls from 1798, but, unfortunately, the minute books begin only with 1810, seventeen years after regular annual assessments had been established. Even at that date, however, the principal executive municipal functions were exercised by the Justices in Sessions, and throughout the minutes one constantly comes upon notes of business relating to local assessment and taxes.

The records, of course, cover also the judicial and legislative, as well as the executive functions, of the Quarter Sessions. Many well known names appear there, and the minutes altogether present an unexpectedly vivid picture of the times.

Among the magistrates appear the familiar names of William Jarvis, John Small, Will. Willcocks, Alexander Wood, William Allan, James Fulton, and Thomas Ridout. The last named was at first Clerk of the Peace, but resigned his office to take a seat on the Bench, giving place to Stephen Heward as Clerk of the Peace. D'Arcy Boulton and Jordan Post are pathmasters. John Ashbridge is surveyor of highways. Joseph Cawthra is pound-keeper. Hugh Heward is an assessor. William Allan is treasurer for the Home District. Benjamin Cozens is high constable. John Jordan, William and Maria Wilcocks, John Small, William Jarvis, Forbes Mitchell (Michie?), James Fulton, and Jabez Snider appear before the Sessions in various capacities, some to give information to or to transact business with the Justices, others to account for defaults in delivering lists of rateable property, or in performance of road duties, etc., etc.

The primitive society would appear to have been somewhat turbulent. Nearly all the offences dealt with judicially are assaults. Almost the first case is the charge of an assault by Stephen Heward, on which he was found guilty. On 9th April, 1811, the Bench consisted of five Justices, William Allan, Duncan Cameron, Donald McLean, Samuel Smith, and Archibald Thompson, and the case of the King at the prosecution of William Mattice against George Dennison for assault and battery, was disposed of favourably to the accused, who was acquitted. Shortly afterwards follows an apparently simple statement, namely, "the Court adjourned for half an hour." At the expiration of the half hour there met a board of four Justices, being all the above mentioned, except Duncan Cameron, and the grand inquest presented to the Court a presentment made by them against the same Duncan Cameron of York, Esquire, for an assault and battery on one James Chisney, to which honest Duncan pleaded guilty, and was fined one shilling, which he promptly paid to the sheriff in Court. Then, purged of his iniquity, he was free to mount the Bench again, but with admirable taste he did not do so till the following day, and so did not join in an order made that day that a warrant do issue against Jesse Updegraff on

the charge of having "damned the King and used other disrespectful language, on the 23rd day of March, 1811, at the house of John McBride on Yonge street." It is unsatisfactory to learn later, on 8th October, 1811, that James German, apparently bound over to give damning evidence against Updegraff, appeared on his recognizance and was discharged, because Updegraff could not be found in the District.

It does not appear to have been the masculine portion of society alone which had that primitive tendency to redress wrongs summarily by assault. On 10th July, 1811, was tried the case of the King at the prosecution of Elizabeth Coakley v. Leah Flanagan for assault and forcibly entering a dwelling house, and it furnishes incidentally an example of a convenient if informal method of rendering a verdict. The Court directed that the jury were to attend at the house of the chairman, William Allan, if they agreed upon a verdict before 10 o'clock at night (obviously the primitive, or at any rate William Allan's, bed-time), and the verdict would be partially received. The defendant's attorney promised that he would take no advantage of such proceeding should the verdict be given as above. It is then noted that on or about the hour of 10 o'clock the jury agreed upon their verdict and according to the direction of the Court repaired to the house of the chairman, where they partially gave in their verdict of guilty. They were ordered to appear in the jury box at 9 o'clock next morning, when being called, their verdict of guilty was formally returned and it was ordered that the prisoner at the bar, Leah Flanagan, do find sufficient sureties of the peace for one year, and (with even-handed justice) that the plaintiff do the same.

On 20th July, 1811, Benjamin Cozens, the high constable, was summoned and ordered to make and return the sales of Quakers' property for militia fines, imposed on them during the preceding year. On 26th October he was unable to produce the purchase moneys arising from the sales, stating that they were not yet paid by the purchasers. He was allowed a week to produce the money or notes of the purchasers. We find that he did so, making a return of 106 executions against Quakers' property, and was ordered to receive £16 for his

services, provided the whole amount of £34 payable was collected.

On 9th October, 1811, an entry records the due respect shewn to the magistrates by William Warren Baldwin, Esquire, Junior Judge of the Home District Court, who applied to the Justices to allow him to open the District Court in the Upper House, which was granted.

The first Assessment Act (33 Geo. iii. c. 3) recites (s. 30) the ancient usage of England for members to receive "wages" for attendance in Parliament and that it was expedient to adopt the practice in the Province. It was therefore enacted that the Speaker by warrant should signify the time that each member "hath attended his duty in said Assembly," and authorised the demand from the Quarter Sessions of an amount not exceeding 10s. a day, to be levied on the inhabitant householders in the Districts represented by the member. We accordingly find in the minute books on several occasions the presentation of the Speaker's warrant to the Sessions; for example, on 19th April, 1810, by Thomas B. Gough and John Wilson, for their "wages" £21 and £24, respectively, as members for the east and west ridings, respectively, of York, which sums were ordered to be raised (under 43 Geo. iii. c. 11) on the assessments for those ridings.

On the 1st March, 1811, William Jarvis informs the Court that a negro boy and girl, his slaves, had the evening before been committed to prison for having stolen gold and silver out of his desk in his dwelling house, and escaped from their said master, and he prayed that the Court would order that the prisoners be brought before it with one Coackley, a free negro also committed to prison on suspicion of having advised and aided the said boy and girl in eloping with their said master's property. They were accordingly ordered to be brought before the Court for examination, and it was ordered that the negro boy named Henry, commonly called "Prince," be recommitted to prison and there safely kept until delivered according to law, and that the girl be returned to her master, and that Coackley be discharged.

Twice the sheriff, John Beckie, reports on the insufficiency of the gaol of the Home District. On 13th April, 1811, he



complains that "The sills of the east cells . . . are completely rotten," and that "the ceilings on the debtors' rooms are insufficient." "Such being the case," he says, "I cannot think myself safe should necessity oblige me to confine any persons in said cells or to those rooms, and do therefore protest against them."

An estimate of expenses for the repair of the floor of the gaol being laid before the Court, it was recommended that the chairman apply to His Excellency the Lieutenant-Governor, that he "will be pleased to direct that the spike nails be furnished from the King's stores, as there are not any of the description required to be purchased at York."

Again, on 4th December, 1811, the sheriff writes to the chairman of the Sessions—"I beg leave to state to you that the prisoners in the cells of the gaol of the Home District suffer much from cold and damp, there being no method of communicating heat from the 'chimnies,' nor any bedsteads to raise the straw from the floors, which lie nearly if not altogether on the ground. Therefore, I have to request that you will refer this matter to your brother magistrates, and suggest that a small stove in the lobby of each range of cells, a rough bedstead for each cell, together with some rugs or blankets, will add much to the comfort of the unhappy persons confined, and it is to be hoped will remove the grievance complained of."

The Justices were humane and ordered "that the treasurer do procure two small 'mettle' stoves and pipes and direct them to be put up in the lobby of each range of cells and furnish such bedsteads, blankets or rugs as seem to be found necessary for the prisoners."

Only in their details less interesting reading are the yearly recurring acts of municipal administration such as the supervision of road work in the hands of the overseers of highways, the application of road money, the enforcement by fine of the performance of their duties by the overseer and those warned by him for road work, the passing of the accounts of the treasurer and the various officers connected with the administration of justice. Where no township meetings have been held we find the Justices appointing town

clerks, wardens, assessors, pathmaster, collector, and pound-keeper for the township.

John Jordan is on record as having refused to act as collector, and being summoned to account for his conduct, is fined for the refusal. He pays his fine, is thereby declared exempt, the office is declared vacant, and William Smith is ordered to attend to be sworn in as collector in Jordan's stead. (See 33 Geo. iii. c. 2, s. 9.)

Matters relating specially to assessment and taxation are constantly coming before the Justices. Some assessment appeals are heard, but these are not numerous. Defaulters in furnishing lists of their rateable property are reported by assessors and summoned before the Sessions; some are fined 40s., others settle and save their fines by making a return; assessors late in returning their rolls are summoned; the expenditure for the coming year is estimated, and the rate or assessment fixed.

Our present complicated municipal organization is the successor but not the descendant of the Justices in Quarter Sessions partriarchially occupied as the above extracts depict. The democratic principle in local government prevailed, and the elective municipal council, answerable to the people annually, superseded the oligarchical rule of the Justice of the Peace.

For nearly six centuries he has been with us, patiently or impatiently enduring, or often, it may be, unconscious of, sneers at his simplicity, ignorance, pomposity, or other failings to which the rest of us are also subject, but enjoying his dignity, in some fashion doing his work, and possibly transmitting to descendants a taste and capacity for the administration of affairs. Though shorn of his municipal functions, he has himself survived, and is at the basis of the administration of the criminal law, where he still shews his original aptitude for doing good for no adequate reward, but for dignity's sake and the honour of the thing.

THOMAS LANGTON.

Toronto.

(To be continued.)

## RECENT CASES FROM THE TIMES REPORTS.\*

**Adulteration Act.]**—Hudson v. Bridge, 19 T. L. R. 369, and Boots' Cash Chemists v. Cowling, 19 T. L. R. 370, are cases under the Sale of Food and Drugs Act, 1875 (see the Adulteration Act, R. S. C. c. 107, and amendments). In the first case, in which vinegar of squills was the article in question, the sufficiency of the certificate of the analyst was successfully objected to, but the decision turned upon the more important ground, that, there being no standard in the British Pharmacopœia of the quantity of acetic acid that drug should contain when actually compounded, but merely a direction as to the amount to be added in the course of compounding it, the magistrates could not, on evidence as to probable decomposition, fix a standard themselves and find that the article sold fell short of it. In the second case—as to liniment of soap—it was held that as to an article of such a general nature evidence of a settled commercial standard might be given, though as to the effect to be given to that evidence no principle was laid down, that question being left open for determination.

**Arbitration.]**—Although, having regard to the provisions of R. S. O. 1897 c. 62, ss. 19 to 27, a similar difficulty cannot well arise in this Province, it may not be amiss to note the case of Llandrindod Wells Water Co. v. Hawksley, 19 T. L. R. 402, where the plaintiffs were held entitled to recover from arbitrators the amount paid to them for fees over and above the amount allowed to the plaintiffs in the taxation as against the other parties to the arbitration of the costs of the arbitration.

**Carriers.]**—The point in London and North-Western R. W. Co. v. Hinchliffe, 19 T. L. R. 430, is a simple one. The fare from A. to C. was more than the sum of the fare from A. to B. and from B. to C. It was held that the defendant could not take a ticket from A. to B. and then go on in the

\*Including the cases in No. 22. Vol. 19, week ending May 6th, 1903.

same train from B. to C. upon tendering the amount of fare payable by travellers between those points, the regulations of the plaintiffs guarding against this possibility.

**Chose in Action.]**—The rule that as between assignees of a chose in action priority of notice prevails, was held in *Montefiore v. Guedella*, 19 T. L. R. 390, to apply by analogy to a fund in Court, the obtaining of a stop order, in good faith and without knowledge of the prior assignment, being treated as equivalent to prior notice in good faith.—It was held in *Brandt v. Dunlop Rubber Co.*, 19 T. L. R. 409, that a letter by vendors of goods to the purchasers thereof asking them to sign and send to the vendors' creditors an attached memorandum promising in effect to pay the price of the goods to the creditors, amounted, when the memorandum had been signed and the letter and memorandum had been handed to the creditors, to an absolute assignment of the debt within s. 25, s.-s. 6, of the Judicature Act (O. J. A., s. 58, s.-s. 5), enforceable by the plaintiffs in their own name.

**Company.]**—Section 89 of the Companies Act, 1862, of which s. 18 of the Winding-up Act, R. S. C. c. 129, is almost a counterpart, provides that the Court may at any time stay winding-up proceedings. In *In re Telescriptor Syndicate*, 19 T. L. R. 375, a stay was asked on the consent of all the creditors and most of the contributories, but was refused; Buckley, J., who heard the application, thinking that inquiry should be made as to the issue of certain shares to one of the promoters, who transferred subsequently most of them to some of the directors, the rights of contributories inter se being in this way possibly affected. The contention that valuable patents owned by the company would not be sold to advantage by the official receiver was held not a sufficient ground for a stay. After disposing of the legal question. Buckley, J.—the directors' counsel having requested him to rule on the question—expressed a strong opinion as to the impropriety of the acceptance by the directors of the shares from the promoter, and negatived in incisive language the plea of one of the directors that, because he received no fees and attended no meetings, he had incurred no responsibility in connection with the management of the company. "This is

a frame of mind to be strongly condemned. A man cannot accept office and then say he is not responsible for the duties of the office. It is, I think, of the first importance that it should be understood that a director, whether paid or electing to serve without payment, owes duties which he cannot in honour and honesty and legal liability disregard."

**Evidence.]**—It was held in *Wilton and Co. v. Phillips*, 19 T. L. R. 390, that a certified extract from the register of births is, with proper evidence of identification, sufficient to prove the date of birth of the person in question.

**Gaming.]**—In *Fielding v. Turner*, 19 T. L. R. 404, keeping in a shop an automatic slot machine, which, on a spring being released, threw a deposited penny into one of the seven compartments, with the possible result to the depositor of forfeiture of the penny or the procurement of twopenny worth of sweets or tobacco, was held to be a using of the shop for the purpose of unlawful gaming.

**Landlord and Tenant.]**—A covenant by the lessee to pay "all rates, taxes, and assessments whatsoever which now are or during the term shall be imposed or assessed upon the said premises, or on the landlord or tenant in respect thereof, by authority of Parliament or otherwise," was held in *Lumby v. Faupel*, 19 T. L. R. 426, not to be wide enough to make the lessee liable for the portion of the cost of paving a street charged against the property under the Public Health Act.

**Limitation of Actions.]**—In *Wilson v. Walton and Kirkdale Permanent Building Society*, 19 T. L. R. 408, a peculiar point was raised under the Statute of Limitations. The building society on default took possession of mortgaged premises and received the rents for more than the statutory period before action. Within that period, however, the property in question had been referred to in certain statements of the society's auditors under the head of "mortgages," with the amount due specified. It was unsuccessfully contended that this was an acknowledgment sufficient to preserve the right to redeem.

**Master and Servant.]**—Of the numerous cases in recent numbers of the Times Reports arising under the Workmen's Compensation for Injuries Act, it may perhaps be of use to note *Vamplew v. Parkgate Iron and Steel Co.*, 19 T. L. R. 421, where the County Court Judge held, and the Court of Appeal saw evidence to justify the finding, that a man employed to break steel and clear cinders at a rate per ton payable weekly, with five or six men under him whom he used to engage and discharge, was a contractor, not a workman.

**Mistake.]**—The plaintiffs in *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort*, 19 T. L. R. 427, were in the habit of buying goods from a firm of importers, and of then paying the purchase money, under assignments from the importers, either to the defendants, who were bankers making advances to the importers, or to another firm of bankers. By mistake of a clerk of the plaintiffs the purchase money of a consignment of goods was paid by the plaintiffs to the defendants instead of to the other firm of bankers to whom it had been assigned, and the plaintiffs had to pay again. It was held that the plaintiffs were entitled to recover from the defendants the amount paid, though the defendants had taken the money in good faith and had credited the importers with the amount, but had not because of its receipt altered their position.

**Patent.]**—The judgment in *Badische Anilin Und Soda Fabrik v. Chemische Fabrik Vormals Sandoz*, 19 T. L. R. 308, noted ante p. 185, as to the right to claim in England an injunction against foreigners who solicited orders in England for goods to be made and delivered abroad, was affirmed by the Court of Appeal: 19 T. L. R. 382.

**Will.]**—In *Eyre v. Eyre*, 19 T. L. R. 380, a codicil duly executed was admitted to probate although expressed to be a codicil to a supposed will which did not in fact exist.—In *In re Hall, Rawlings v. Hall*, 19 T. L. R. 420, a devise in general terms of all the testator's property was held not to be a revocation of a previous appointment of insurance money, though that appointment contained a power of revocation by will.

## EDITORIAL REVIEW.

**Sudden Death of Mr. Justice Mills.**

The Hon. David Mills, one of the Judges of the Supreme Court of Canada, died suddenly at Ottawa, on the 8th May last. He was sitting quietly with his family at home, and death overtook him before medical aid arrived. He had been sitting in Court on the very day of his death. He had a distinguished career in Parliament and as a Minister of the Crown. He was undoubtedly well versed in constitutional law; he was an able journalist and a writer of graceful verses; above all he was a man of sterling character, respected by every one, and dearly loved by his friends. He was for a very short time—a little over a year—upon the Bench. His appointment was regarded by the Bar as an unsatisfactory one, from his want of experience as a practical lawyer, and he certainly added little to his reputation by his judicial work. But there is no doubt that he strove hard to master the cases which came before him, and it is not unlikely that excessive application, at his advanced age, was the cause of his sudden death—it was thought from the bursting of a blood-vessel. One of his last judicial acts was the preparation of a judgment on the constitutional case as to whether the Parliamentary representation of Nova Scotia, New Brunswick, and Ontario should be reduced. He was firmly of opinion that the Federal Government's position was sound, and that under the readjustment of members consequent upon the census the representation of the Provinces named must be reduced. In this judgment the Chief Justice, Mr. Justice Armour, and Mr. Justice Sedgewick concurred.

**The New Judge of the Supreme Court.**

The Government of Canada has made a departure in the appointment to the Federal Bench of Mr. Wallace Nesbitt, K.C., a young man and a Conservative. It was natural that the successor to Mr. Justice Mills should be an Ontario man, though there were rumours of the promotion of a Judge

from one of the western Provinces. It is pretty well known that owing to the ridiculous and antiquated arrangement of the salaries, none of the Ontario Judges, or at least none who would add strength to the Supreme Court Bench, would be available. It was thought, also, that the leaders of the Ontario Bar were not available, that is, that none would accept a seat on the Bench. Probably outsiders never dreamed of Mr. Nesbitt being appointed. In recent years political opponents of the Government of the day have not been made Judges. We know of no instance of the kind since the appointment of Mr. Justice Maclellan in 1888. But the Government seems to have experienced a change of heart. We believe that in this case, as in some other recent cases, they looked about for the best man available, and we do not hesitate to say that they found him in the person of Mr. Nesbitt. He made his mark at the Bar almost as soon as he was called. He has never ceased to be a diligent student; he is clear-headed and hard-headed; and he has been for several years an acknowledged leader of the Bar, with all that that implies in the way of experience. Mr. Justice Nesbitt will undoubtedly strengthen the Supreme Court Bench, and, as he is still young, it may be hoped that he will adorn it for many years. He was born in 1859; called to the Bar in 1881; practised at first in Hamilton and then in Toronto; and was made a Queen's Counsel in 1896.

#### **Mr. Justice Teetzel.**

The Dominion Government has made another excellent appointment in the elevation of Mr. James Vernon Teetzel, K.C., of Hamilton, to the place in the Common Pleas Division of the High Court of Justice made vacant by the lamented death of Mr. Justice Lount. Mr. Teetzel is a sound lawyer, and has a good deal of experience both at nisi prius and at Osgoode Hall. He is very much liked by his late associates at the Bar, and it is predicted that he will be a favourite with the public, for he is conscientious, fair-minded, and courteous even to an unusual degree. He was born in 1853; called to the Bar in 1877; became a Queen's Counsel in 1890, and a Bencher of the Law Society in 1891; was mayor of



Hamilton in 1899 and 1900. In politics a Liberal, but persona grata to his opponents. He was sworn in at Osgoode Hall on the 19th May, and at once entered on the active discharge of his duties by trying cases without a jury at the Toronto sittings.

#### **The Northern Securities Case**

The Northern Pacific Railway Company and the Great Northern Railway Company are the owners respectively of two transcontinental railways which have been hitherto rival and competing lines. The Government of the United States filed a bill against the two railway companies and the Northern Securities Company, which had acquired the control of the two roads, to restrain the violation of an Act of Congress passed in 1890, intituled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies," commonly called the Sherman Anti-trust Act. The cause was heard before a Circuit Court composed of four Judges; it was adjudged that the stock of the two railway companies now held by the securities company was acquired in virtue of a combination of the defendants in restraint of trade and commerce among the several States such as the Sherman Act declares illegal; and an injunction was granted as prayed by the bill. The opinion of the Court, delivered by Judge Thayer, was concurred in by the other three Judges. Judge Thayer, in concluding his opinion, said: "It may be that the motives which inspired the combination . . . were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or that the combination was the initial and necessary step in the accomplishment of great designs, which, if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve, and to the country at large. We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them involve questions which are not within the province of any Court to decide, involving, as they do, questions of public policy which Congress must determine. It is our duty

to ascertain whether the proof discloses a combination in direct restraint of interstate commerce, that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination, and we have little hesitation in answering this question in the affirmative, then the Anti-trust Act, as it has heretofore been interpreted by the Court of last resort, has been violated." An appeal to the Supreme Court of the United States has been perfected, and a final adjudication is expected in October or November next. As the Albany Law Journal points out, the importance of the decision lies in the fact that the bare possession of means of restraining trade, irrespective of the purposes or aims in view, is prohibited; in other words, that the mere ownership of two competing lines by the Northern Securities Company is in itself a restraint of trade.

#### **An Imperial University of Law**

By the recent sale of two of the ancient Inns of Court in London, namely, New Inn and Clifford Inn, a fund of nearly £100,000 has been made available for the purposes of legal education. The fund is at the disposal of the Attorney-General, subject to the Court of Chancery, and in an address to the Court some weeks ago, Sir Robert Finlay indicated generally his intention of applying it to the foundation in London of a school of law in which provision shall be made for the systematic and scientific teaching of all branches, including such as are administered within the British Empire.

A scheme is to be submitted to the Court on some future day. A good deal of opposition will no doubt be developed, but it may be hoped that the scheme will be approved. It was outlined originally by Lord Selborne, was vigorously championed by the late Lord Russell of Killowen, and is supported by the present Lord Chief Justice. The Montreal Gazette, in an article which has been more than once quoted, refers to it as a scheme particularly attractive to Canadians:—

"The idea of a grand Imperial Law School, where would be given instruction in the laws of the mother country and of

all the colonies and dependencies of the Empire, especially in such subjects as are of general application, is an attractive and ennobling conception, fraught with the most momentous consequences for the future of the nations, from a legal and administrative, as well as from a political point of view. . . . Sir Robert Finlay's scheme can hardly fail to be of immense value, not only as a means of providing for the legal education of future generations of British, colonial, and Indian lawyers, but as another link in the chain of community of interests and tradition, upon which the future integrity of the Empire will have to depend."

#### **Committal of Judgment Debtor Where Servant of Crown.**

The Court of Appeal (Ireland) on the 16th April upheld the reasoning of Mr. Justice Gibson in *Hamilton and Co. v. Conyngham*, and held that a commissioned officer in the army might be committed by an order of the Court for failure to pay instalments under the Debtors Act. It was distinctly laid down that inalienability or non-assignability of a salary, if it existed, though it would be a reason for refusing to grant a garnishee order or an order for the appointment of a receiver, was no answer to an application for committal for failure to pay instalments. A similar conclusion was reached in Ontario in *In re Hyde v. Caven*, 19 Occ. N. 359, 31 O. K. 189.

#### **The Late Lord Watson.**

"I am indulging in no panegyric," said Mr. Haldane, addressing the Scots Law Society, "inspired by mere personal regard for a great Judge whom I was privileged to know, when I say that he had rendered more services to the Empire than many a distinguished statesman. Those who have followed closely the recent history of Canada know and can illustrate what I mean. In 1867 Lord Carnarvon passed his Confederation Act, which created a Constitution in accordance with resolutions passed in various parts of Canada. Under this Constitution there was to be a central Parliament and Executive at Ottawa to deal with the general affairs of Canada, and Parliaments and Executives in the Provinces which should deal with provincial matters. The people of the

colony, who were suspicious of interference from Downing street, also obtained power to create a Supreme Court for Canada which should settle any constitutional questions that might arise, the intention being to get rid as far as possible of the Privy Council as a Canadian court of appeal. This Court was not set up for some years, but when it was, it began to produce a very different effect in the colony from that which was intended. The Judges took, or were supposed to take, the view that the meaning of the Confederation Act was that the largest interpretation was to be put upon the powers of the central or Dominion Government and the smallest on those of the provinces. About twenty years ago a series of decisions was given by the Supreme Court of Canada which certainly gave colour to this view. There was alarm in the provinces, and the result was a succession of appeals to the Queen for which special leave was obtained from the Privy Council. I well remember the circumstances of these cases, for it so happened that when a junior I was taken into them on behalf of Ontario, which bore the brunt of the struggle with the Dominion before the Privy Council. So important were they deemed in Canada that the Provincial Prime Ministers used to come over to argue in person with the assistance of the English counsel. Almost from the first Lord Watson took the lead in the decision of these appeals. He worked out a different view of the Canadian Constitution from that which had been foreshadowed by the Canadian Courts. He filled in the skeleton which the Confederation Act had established, and in a large measure shaped the growth of the fibre which grew around it. He established the independence of the provinces and their executives. He settled the burning controversies as to the Liquor Laws, and as to which Government, Dominion or Provincial, had the title to gold and silver. His name will be long and gratefully remembered by Canadian statesmen. It is difficult to realize that he is gone. He was the Privy Council Judge par excellence. His mind was wholly free from any tendency to technicality, and he never failed to endeavour to interpret the law according to the spirit of the jurisprudence of the colony from which the appeal came. If it was a Cape appeal, he was a Roman-Dutch

lawyer; if it was an Indian case of adoption, he entered into the religious reasons for the rule to be applied. If it was a Quebec case of substitution under the old French Code, or a Jersey appeal under the Custom of Normandy, it was just the same. He imported none of the prejudices of the Scotch or English lawyer. In the House of Lords he was just as striking, whether it was a Scotch appeal or an English case about some abstruse question of real property law. He was a great Judge. For you his name will go down to posterity coupled with those of your great Scottish lawyers—the men of whom Inglis was the type. For us in England he will be recalled as one of the most superb Judges that ever sat in the House of Lords. But the greatest memory of him will, to my mind, be that which must long be preserved in the distant colonies of the Empire, for which he was the embodiment not only of a great legal intellect, but of absolute freedom from partisanship, and a passionate love of justice.”

#### **Dramatic Criticism and the Law of Libel.**

A case which has excited a great deal of interest in England and on this continent is *McQuire v. Western Morning News Co.*, in which the Court of Appeal on the 11th May gave judgment for the defendants. The facts are thus given by the *London Law Times*:—

The plaintiff was an actor and theatrical manager, and produced at a theatre a musical play which he had himself written and composed. The defendant company published in their newspaper a criticism of this play, and upon this criticism the plaintiff founded an action for libel. It was not suggested by him that there was any evidence of actual malice on the part of the defendants; there was no personal imputation in the alleged libel, nor could any statement of fact be impugned. The innuendo set out in the statement of claim was, that, by the words complained of, the defendants meant and were understood to mean, and the meaning of the words was, that the play was dull, vulgar, and degrading; that the members of the plaintiff's company were incompetent as actors, singers, and dancers; that they were

music-hall artists; and that the plaintiff himself was incompetent both as an actor and as a composer. The plaintiff contended that the criticism complained of was not "fair comment," and at the trial of the action before Ridley, J., with a jury, he obtained a verdict for £100 damages, and judgment was entered accordingly. The defendants applied for judgment or a new trial. *Carr v. Hood*, 1 Camp. 355, *Henwood v. Harrison*, L. R. 7 C. P. 606, and *Merrivale v. Carson*, 20 Q. B. D. 275, were cited. The Court of Appeal (Collins, M.R., Stirling and Mathew, L.JJ.) held that the expression "fair comment" in connection with the law of defamation, means comment which is relevant and which is not such as to disclose in itself actual malice. In the present case there was no evidence upon which a rational verdict for the plaintiff could be founded, and the defendant company were therefore entitled to have judgment entered for them.

It would seem to follow that the mere fact that the criticism is severe is not sufficient to allow a jury to express their opinion as to its fairness or correctness, but their functions apparently only commence when want of bona fides or relevancy is shewn.

#### **Now Rule of Court.**

The following Rule was on the 11th May, 1903, made by the Judges of the High Court of Justice for Ontario under R. S. C. c. 129, s. 92: "Rule 699 shall apply to cases under the Dominion Winding-up Act, and the amendments thereto." The effect of this is to allow an official referee to sit for a Master upon request.

#### **Recent American Decisions.**

*Bankruptcy*.—A seat in a stock exchange owned by one who has no unsettled contracts with or claims against him in favour of other members, under which circumstances the rules of the exchange permit a sale of the seat, is held in *Re Page* (C. C. App. 3d C.), 59 L. R. A. 94, to be within the provision of the Bankruptcy Act that the trustee shall be vested by operation of law with the bankrupt's title to all property which, prior to the filing of the petition, he could by any means have transferred.

*Bastard.*—Legitimation of a bastard, by the laws of his parents' domicile, through their marriage during his minority, is held, in *Fowler v. Fowler* (N. C.), 59 L. R. A. 317, to fix his status so that he is legitimate everywhere.

*Carrier.*—The shooting of a passenger by negro tramps while endeavouring to escape after having been brought into the train under arrest for stealing a ride is held, in *Savannah F. & W. R. Co. v. Boyle* (Ga.), 59 L. R. A. 104, not to render the carrier liable because of the failure of the employees to search and bind the tramps, where there was nothing in the circumstances under which they were arrested to cause the employees to apprehend that they were dangerous characters or likely to resort to violence in an effort to escape.

*Divorce.*—A judgment of divorce rendered in a State in which the wife has acquired a separate domicile, and valid there, is declared, in *Succession of Benton* (La.), 59 L. R. A. 135, to be valid in other jurisdictions. With this case is an extensive note reviewing the authorities on conflict of laws on the subject of divorce.

*Gift.*—An oral assignment of a policy of life insurance by the insured, accompanied by words indicating an intention to give and by a delivery of the policy, is held, in *Steele v. Gatlin* (Ga.), 59 L. R. A. 129, not to constitute a complete gift; and in such case it is held that a court of equity will not interfere at the instance of the alleged donee to complete the gift, when she has not acted to her injury or incurred expense on the faith of it.

*Husband and Wife.*—Land held by a debtor and his wife by entireties is held, in *Laird v. Perry* (Vt.), 59 L. R. A. 340, to pass, except her right of survivorship, by his assignment of all his estate, real and personal, for the benefit of creditors, under statutes making everything pass which might be taken in execution against him, but providing that neither the wife's separate property nor its products shall be liable for his debts.

*Injunction.*—The publication of an unjust and malicious criticism of a manufactured article is held, in *Marlin Firearms Co. v. Shields* (N. Y.), 59 L. R. A. 310, not to be restrainable by injunction, although the manufacturer has no remedy at law because of inability to prove special damages.

*Insurance.*—A railway paymaster travelling upon business of the company from station to station, and stopping between stations for the purpose of paying off employees wherever they may be, is held, in *Travellers Ins. Co. v. Austin* (Ga.), 59 L. R. A. 107, not to be, while so doing, a “passenger” within the meaning of a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power.

*Medicine and Surgery.*—A physician is held, in *Burk v. Foster* (Ky.), 59 L. R. A. 277, not to be absolved from liability for failure to exercise proper skill in a particular case by the fact that the result is as good as is usually obtained in like cases.

*Railway.*—The negligent jolting of a train by which a passenger is hurled through the rear door and left in an insensible condition upon the track is held, in *Southern R. Co. v. Webb* (Ga.), 59 L. R. A. 109, to be the proximate cause of his death, where he is subsequently run over and killed by an engine belonging to another company which the first company knew had a right to use the track and was likely to use it at any time.

*Street Railway.*—A street car passenger who is ejected from a car to which he is transferred because of a mistake not noticed by him in the transfer slip given him by the conductor to whom he paid his fare, is held, in *Lawshe v. Tacoma R. & P. Co.* (Wash.), 59 L. R. A. 350, to be entitled to recover substantial damages from the company.

*Way.*—A city which voluntarily constructs a cinder bicycle path along the side of one of its streets is held, in *Prather v. Spokane* (Wash.), 59 L. R. A. 346, to be bound to construct and maintain it so that it will be reasonably safe for the ordinary use for which it is intended.



## BOOK REVIEWS.

**Martin's Mining Cases and Statutes of British Columbia.**

—Reports of Mining Cases Decided by the Courts of British Columbia and the Courts of Appeal therefrom to the 1st October, 1902; with an Appendix of Mining Statutes from 1853 to 1902; and a Glossary of Mining Terms. By The Honourable Archer Martin, one of the Justices of the Supreme Court of British Columbia and the Judge in Admiralty for that Province; Author of "The Hudson's Bay Company's Land Tenures," etc., etc. Toronto: The Carswell Co.: 1903. (900 pages, \$20, half-calf, or circuit binding.)

Mr. Justice Martin, who comes of a well known family in Ontario which has given several distinguished sons to the legal profession, in an interesting note dedicates this important volume to the memory of Richard Martin, Esquire, M.P. (surnamed "Humanity," 1754-1834), of Ballinahinch Castle in the county of Galway, Ireland, author of the "Act to prevent the cruel and improper treatment of cattle" (3 Geo. IV. c. 71), commonly called "Martin's Act," and who in 1821 introduced into the House of Commons a bill to permit persons charged with capital offences to have the assistance of counsel, which was thrown out on its second reading.

The publishers announce the present volume, the first of a contemplated series, as the most important legal work hitherto undertaken in the west of Canada. The importance of the subject cannot be gainsaid, and the treatment is adequate. Judge Martin is, indeed, an ideal editor of reports. His headnotes and footnotes are models of clearness and conciseness. We venture to think that no more carefully and judiciously edited volume of reports has been issued in recent years in Canada or elsewhere.

The great development of the mining industry in British Columbia is shewn by the fact that the output of all minerals to the end of 1901 was \$172,241,988. There has naturally been a great increase in mining litigation and decisions on the Mineral Acts of the Province. The author in the first part of the volume has collected the reported decisions from

various publications, reported those which were not hitherto reported, and has so arranged, annotated, and indexed them, that the inquirer into the state of the law affecting mining rights and property can readily inform himself on any branch of the subject, without overlooking anything that has been decided. Great difficulty being constantly experienced in tracing up through many volumes of statutes, often unindexed, the law applicable to mining claims located in different years under different laws, the volume, in the second place, includes, in the form of an appendix, a verbatim reprint of all mining statutes, so far back as to cover the title to every existing mineral claim in the Province, and also a selected few of the earliest gold laws and proclamations, so as to shew and explain the origin and development of British Columbia mining legislation. There is also a table or list of every proclamation, ordinance, law, statute, or regulation issued since the first one in 1853.

The preface contains a valuable historical note of the early discoveries of the precious metals in various parts of the Province. A glossary of mining terms, revised by the Provincial Mineralogist, is a useful and interesting addendum; and the index-digest is full and accurate. A supplemental sheet of decisions brings the volume up to the 1st February, 1903.

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**Smith's Leading Cases.**—A Selection of Leading Cases on Various Branches of the Law: with Notes. By John William Smith. The Eleventh Edition, by Thomas Willes Chitty, John Herbert Williams, and Herbert Chitty, Barristers-at-Law. London: Sweet & Maxwell, Limited: 1903.

No new leading cases have been added in this edition, but the notes bring the case law up to the present time. *Fletcher v. Rylands* was added in the 10th edition. The translation from the original French of the text of *Manby v. Scott* (12 Car. II.) has been revised for this edition. *Melius est petere fontes quam sectari rivulos*, is still true, and we believe that the appreciation of *Smith's Leading Cases* in Canada will continue undiminished. Editors and publishers have again done their work well in the two bulky volumes before us.

PERIODICALS AND PAMPHLETS RECEIVED.

**Considerations on the State Corporation in Federal and Interstate Relations; The Northern Securities Cases;** by Carman F. Randolph, of the New York Bar. *Columbia Law Review*.

**The Digest:** A monthly journal containing brief notes of Indian cases and other legal matters. Edited by Dharm Das Suir. November and December, 1902. Lahore: Kishen Chand Seth.

**The Punjab Law Reporter:** A monthly journal containing cases determined by the Chief Court of the Punjab, etc. Edited by Dharm Das Suir. Index to Vol. III., and No. 1 of Vol. IV., January, 1903. Lahore: Kishen Chand Seth.

**The Indian Law Review:** Vol. IV., No. 2, February, 1903. Madras: G. A. Natesan & Co.

**The Bombay Law Reporter:** A fortnightly legal journal, 15th and 28th February, 1903. Index for 1902. Bombay: Rantanlal Ranchoddas.

**The Calcutta Weekly Notes:** A journal of law notes and reports of the Calcutta High Court, etc., Vol. VII., Nos. 14 and 15.

**The Kathiawar Law Reports:** Vol. XII., No. 11, February, 1903. Limbdi, Kathiawar: Ganeshji Jethabhai.

**New York State Library:** Bulletin 79. Comparative Summary and Index of Legislation, 1902. Edited by Robert H. Whitten. Albany: University of the State of New York.

**The Columbia Law Review** for May contains leading articles on "Novel Partition Procedure," by Robert Ludlow Fowler, and "The Northern Securities Cases, III.," by Carman F. Randolph.

**The Chicago Law Journal** of the 1st May has a brief summary of an address by Judge John Woodward on "The Sources of the Constitution."

**The Law Magazine and Review** (London) for May has, among other articles, one on "Legal Etymology," by James Williams, D.C.L., LL.D., and one on "Surviving Absurdities and Curiosities of the Law," by J. M. Lely.

**The Canadian Law Review** for May gives a portrait of Mr. Z. A. Lash, K.C., of Toronto, and has an article by Judge McCrimmon (Whitby, Ontario,) on "Sir Walter Scott as a Lawyer." It also contains a full report of the Northern Securities Case, and a transcript from Hansard of the debate in the Canadian House of Commons on the resolution to establish a Divorce Court, besides reprinted articles.

**The Columbia Law Review** for June supplies original papers on "Maritime Lien for Damage," by Thomas G. Carver; "Is Suicide Murder?" by William E. Mikell, and "Agency Imputed from Course of Business," by Edward B. Whitney.

**The Albany Law Journal** for May gives its readers some instructive and entertaining miscellany. The leading article is by a lady, Glenda Burke Slaymaker, of the Indiana Bar, on "The Right of a Negro Litigant to a Trial by a Mixed Jury."

**The New York State Library Bulletin** for May contains a review of legislation from 1st October, 1901, to 1st October, 1902.

# THE CANADIAN LAW TIMES.

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JULY, 1903.

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## IS ACTION BY HOLDER AGAINST DRAWER OR INDORSER OF A BILL OF EXCHANGE ON THE LAST DAY OF GRACE PREMATURE?

THE decided cases so far leave this question in a very unsatisfactory state. Not until it shall have passed under the revision of the highest court of appeal in the Empire will the profession rest satisfied.

Maclaren, in the first edition of his excellent works on Bills, Notes, and Cheques, at page 269, thus disposes of the question as to acceptor:—"The acceptor may be sued on the afternoon of the last day of grace after demand and refusal:" citing several cases in support of this proposition.

In his second edition, at page 256, we find the following:—"An action instituted in the afternoon of the last day of grace, after dishonour, is premature:" citing in support of this converse affirmation the recent case of *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

Before discussing the question and reviewing the decision of *Kennedy v. Thomas*, let us in the first place consider what are the respective liabilities of drawer, indorser, and acceptor of a bill. And then glance at the sections, both in the Canadian and English Code, which bear upon the point under consideration. The undertaking of both drawer and indorser is conditional. They both respectively undertake to pay the holder, if the bill is dishonoured by non-payment, and provided the requisite proceedings on dishonour be duly taken. Not so with the acceptor. By acceptance he becomes the principal, and absolutely undertakes to pay upon due presentment. To fasten liability upon drawer or indorser,

two events must concur. Dishonour by non-payment on the part of the acceptor, and notice thereof duly given. Lord Lyndhurst in *Siggers v. Lewis*, 1 C. M. & R. 371, thus defines the liability of the drawer:—"Until notice of the acceptor's default is given to the drawer, no action can be maintained; but it is maintainable immediately upon notice being given, if the money is not paid." To like effect as to indorser are the words of Lord Blackburn in *Duncan, Fox, & Co. v. North and South Wales Bank*, 6 App. Cas 18:—"The indorser, by the law merchant, is liable, on having due notice of dishonour, to pay the amount of the bill to the holder for the time being, on having the bill restored to him." Action in either case, however, is not maintainable until notice of the dishonour is actually received. See *Castrique v. Bernabo*, 6 Q. B. 498.

By s. 47 of the Canadian Code, s.-s. 2, it is enacted:—"Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer, acceptor, and indorsers accrues to the holder." This section is an exact copy of s. 47, s.-s. 2, of the Imperial Code, with the exception that in the Imperial Code the word "acceptor" is not used.

Read in this connection s. 51, s.-s. 6 (b), of the Canadian Code:—"Every protest for dishonour, either for non-acceptance or non-payment, may be made on the day of such dishonour at any time after non-acceptance or in case of non-payment at any time after three o'clock in the afternoon." This last mentioned clause is not found in the Imperial Code. It was copied from c. 123, s. 22, of the Revised Statutes of Canada, which in turn had been copied from the Consolidated Statutes of Upper Canada, c. 42, s. 15.

In reviewing the case it will be well to bear in mind s. 47, s.-s. 2, of the English and Canadian Code, as well as the clause in the s.-s. of s. 51 of the Canadian Code with reference to protest after three o'clock in the afternoon of the last day of grace.

The conflicting views of our main question of inquiry were pointedly illustrated in two judgments delivered over one hundred years ago in the leading case of *Leftley v. Mills* (1791), 4 T. R. 170.

The question in this case was, whether a charge for noting on the last day of grace was justly demandable on tender of the amount of the bill at a later hour in the day after it had been noted.

Lord Kenyon, Chief Justice, said:—"The question here is, on what day and at what time was the defendant bound to pay this bill? According to the nature of the contract, the acceptance was an undertaking to pay the bill on the last of the three days of grace. Now, unless there be something in this case to distinguish it from other contracts, it must be governed by the same rules. In the case of mortgages, bonds, and a variety of other instruments, whereby parties oblige themselves to the performance of certain duties, as to pay money within a certain time, we find the rule to be, without any exception, that the party bound has till the last moment of the day to deliver himself from the obligation by paying. The first case in point of time is that of *Hudson v. Barton*, 1 Rol. Rep. 189, where Lord Coke said that a debtor is not bound to pay till the last hour of the day; and though *Haught, J.*, seemed to differ from Lord Coke, that difference was applicable to another part of the case. Lord Hale, also, in *Kabel v. Vaughan*, 1 Saund, 287, was of this opinion, and said that rent was not due till the last instant of the day. *Moor*, 122, pl. 166, and *Salk*. 578, are to the same effect; and I find no authority to the contrary; therefore the law must be the same here as in other cases."

Buller, J., held views directly opposite to those enunciated by the Chief Justice. He is thus reported:—"As to the event of this rule, I must thoroughly concur in opinion with the Court; but I cannot refrain from expressing my dissent to what has fallen from my Lord, respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent, or any of the other cases mentioned by my Lord, cannot, I think, apply to this case. But one of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill, on demand, on any part of the third day of grace; and that rule is now so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills

of exchange, all the books agree that the protest must be made on the last day of grace. Now that supposes a default in payment, for a protest cannot exist unless default be made: but if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore, the usage on bills of exchange is established: they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but, on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by an analogy to the demand of rent, payment of a bill of exchange could not be demanded till sunset; and if so, the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town. However, this consideration need not be further pursued for the determination of this case; for this rule must be discharged, in whatever view it is considered."

Lord Ellenborough held at *Nisi Prius*, that notice of dishonour to the indorser might be given by the holder of a note on the afternoon of the day it fell due, the same being regularly presented for payment in the forenoon of the same day and payment refused. See *Burridge v. Manners* (1812), 3 Camp. 193.

In *Estes v. Tower* (1869), 102 Mass. 65, Mr. Justice Gray held:—"A promissory note entitled to grace is payable on demand at any reasonable time and place on the last day of grace, and, if the maker neglects or refuses payment upon such demand, the note is dishonoured and may be put in suit immediately; but if no such demand is made, and he has done nothing amounting to a waiver of it, he has the whole of the day in which to make payment, and is not liable to an action until the expiration of the time within which such demand might have been made upon him. *Gordon v. Parmelee*, 15 Gray 413."



In *Sinclair v. Robson*, 16 U. C. R. 211, Chief Justice Robinson thus explicitly expresses his view on this question:—  
“But I think the statute 14 & 15 V. c. 94 determines this question, where it provides (s. 1) that all protests of promissory notes for non-payment may be made at any time after three o'clock in the afternoon of the day of dishonour.

“But, independently of the statute, I think the plaintiff was entitled to sue out process when he did; that is, at five o'clock in the evening of the last day of grace, which was after business hours, at the bank where the note was made payable. Besides *Leftley v. Mills*, 4 T. R. 170, where the Judges were divided in opinion upon this point, I refer to the case of *Hartley v. Case*, 1 C. & P. 555, 676, and to *Burridge v. Manners*, 3 Camp. 193. By the express words of the statute 9 & 10 Wm. III. c. 17, an inland bill of exchange cannot be protested for non-payment until after the expiration of the three days of grace, but as regards promissory notes there is no such enactment. We have therefore to take it upon the authority of adjudged cases, and, when these fail, then upon the reason of things.

“As to adjudged cases, the only one that I have found in which the very point which is presented here appears to have been determined, is that of *Wells v. Giles*, 2 Gale 209. But that in truth is not exactly in point, for it was on a bill of exchange, and I suppose on an inland bill, in which case it could not be protested for non-payment till after the three days of grace, as I have just mentioned, and therefore could not have been put in suit before, because, according to the statute, the party could not be in default before. This is the case of a promissory note, to which that statute does not apply, but to which our statute 14 & 15 V. c. 94, does apply, which allows it to be protested any time after three o'clock on the last day of grace; and this, moreover, is a note payable at a bank, which makes this case stronger for holding that, at any rate, even without the statute, the defendant was in fault in not paying it before five o'clock in the afternoon. The defendant engaged to pay it at that place on that day, and if the bank hours were suffered to elapse without his paying it, he certainly was in default, and was therefore, I think, liable to an action for his default; for he would be

liable to the expense of the protest which the law allows to be made if the note is not paid on that day at the bank; and that charge, if the defendant resisted it, could only be enforced in an action on the bill.

“As the case would have stood independently of our statute, Lord Kenyon, it appears from his judgment in *Leftley v. Mills*, would have held that the plaintiff in this case was not at liberty to sue till after the three days of grace had wholly expired, while it seems as clear that Mr. Justice Buller would have held otherwise, and Mr. Justice Grose, as the case went off upon that ground, declined expressing an opinion on the point on which the other two Judges differed. It is only, however, on account of the language used by the Judges in their reasoning upon the case, that *Leftley v. Mills* has any material bearing on this case, because that was an inland bill, in which case the statute 9 & 10 Wm. III. c. 17 leaves no room for question that the cause of action cannot be complete until the day after the three days of grace. I think the plaintiff in this case could commence his action at five o'clock on the evening of the third day of grace: first, by reason of the provision in our statute 14 & 15 V. c. 94; secondly, because this note being made payable by defendant at a bank, defendant was in default when the banking hours were passed, and the bank shut, and the defendant had not paid it, though the plaintiff on that day had attended and demanded payment.

“This point has been nowhere so extensively discussed as in a note to Storey on *Promissory Notes*, 4th ed., s. 225a, where every authority upon the case, both English and American, seems to have been cited. So far as I can find, it may still be said, as it is said in that work, that no express English authority can be cited upon the point, whether an action can or cannot be brought on a promissory note after demand made upon the last day of grace, and the note dishonoured. In the American Courts there have been numerous decisions that the action may be brought on the last day, and I think reason is with those decisions. Mr. Chitty, in his treatise on bills (9th ed., pp. 397, 481), while he treats the case in point as one not expressly decided in any English

adjudged case, is inclined evidently to the conclusion which Mr. Justice Storey has come to in s. 225 a of his work: namely, that when a note has been made payable at a banker's, and remains unpaid when the bank closes, it is the same as if the maker had refused to pay, and that in such a case an action will lie on that day. I think our statute fortifies that conclusion; and that the defendant's rule for entering a verdict in his favour on the first count must be discharged."

In the light of these decisions, coupled with s. 47 of the Code, and the clause in s.-s. 6 of s. 51 in the Canadian Code, with respect to the immediate right of protest after three o'clock in the afternoon of the last day of grace, in the case of non-payment by the acceptor of a bill on presentation, Maclaren's dictum, "the acceptor may be sued on the afternoon of the last day of grace after demand and refusal," seems a legitimate conclusion. This opinion he recalled in his second edition in consequence of the judgment of the Court of Appeal, reversing the judgment of Cave, J., in *Kennedy v. Thomas*, [1894] 2 Q. B. 759.

This action was brought by the holder of a bill of exchange against the acceptor on the afternoon of the last day of grace after presentation at the bank where made payable, and payment refused. Cave, J., who tried the cause, gave judgment for plaintiff, which was subsequently reversed in the Court of Appeal.

As the decision is a most important one and is the latest deliverance on the question, the judgment of Lindley, L.J., is here given in extenso.

"There is no doubt that, upon the payment of the bill being refused by the bank, the plaintiff had an immediate right of recourse against the drawer and indorsers. But the question which we have to consider is, whether the plaintiff has then a cause of action against the acceptor, whether the acceptor could be sued upon the bill before the expiration of the last of the days of grace; in other words, whether the acceptor was not entitled to the whole period up to the end of that day in which to pay the bill. *Prima facie*, I should have thought it plain that according to ordinary principles of law he was so entitled. But we are asked to hold to the

contrary, partly upon the construction of the Bills of Exchange Act, 1882, and partly in deference to the opinion expressed by Buller, J., in *Leftley v. Mills*, 4 T. R. 170.

"When we look at the Act we see that it does not go to that extent. It certainly seems a little paradoxical that a bill of exchange should be treated as dishonoured for one purpose and not for another, but it is clear that, when payment of a bill is refused upon its presentation at any time during the day on which it falls due, the holder has an immediate right of recourse against the drawer and the indorsers. He can at once give notice of dishonour to the drawer and the indorsers, but he is not entitled to commence an action against them, any more than against the acceptor, before the expiration of the last day of grace. If we were to hold the contrary, we should really be cutting down the days of grace. It is true that in *Leftley v. Mills*, 4 T. R. 170, Buller, J., dissented from the view expressed by Lord Kenyon, C.J. Lord Kenyon thought that, in the case of a bill of exchange, as in the case of other contracts, if a man was bound to pay money within a certain time, 'the party bound had till the last moment of the day to deliver himself from the obligation by paying.' Buller, J., said that the acceptor's undertaking was 'to pay the bill on demand on any part of the third day of grace,' and that the bill was 'payable any time on the last day of grace on demand, provided that demand be made within reasonable hours.'

"But the point then before the Court was not the right of the holder to bring an action upon a dishonoured bill, but his right to protest the bill or to give notice of dishonour, and as to that the view expressed by Buller, J., was clearly accurate. The point which we have to decide is not a new one; it was actually decided in *Wells v. Giles*, 2 Gale 209, though that case is not referred to in *Byles on Bills*. But it is a clear decision that an action upon a dishonoured bill cannot be commenced upon the third day of grace. The same thing has been decided in America, as is shewn by the cases which have been cited to us, and it is not inconsistent with the provisions of the Bills of Exchange Act, 1882. *Hartley Case*, 1 C. & P. 555, is rather in favour of this view

than against it. The argument addressed to us on behalf of the respondent is not, as it appears to me, supported by any English authority; and there is the direct authority of *Wells v. Giles*, 2 Gale 209, to the contrary, which is in accordance with the general understanding of the merchants. In my opinion, judgment must be entered for the defendant with costs. The defence is a technical one, but it was distinctly raised in the pleadings."

What then is the proper construction to put upon the words in s. 47, s.-s. 2, of the Canadian Code:—"When a bill is dishonoured by non-payment, an immediate right of recourse against the drawer, acceptor, and indorsers accrues to the holder?"

Lord Justice Lindley, in *Kennedy v. Thomas*, says "immediate right of recourse" is limited to giving notice of dishonour to the drawer and indorsers, while right of action is suspended until the expiration of the last day of grace. If such is the just interpretation, it ceases to be "an immediate right." Immediate right of recourse accordingly must mean a right as distinguished from the right of action. If such is the proper interpretation of the term, what about the acceptor? Notice of dishonour is not required to be given to the acceptor. What right then accrues to the holder against the acceptor? For the terms in the Canadian Code are "an immediate right of recourse against the drawer, *acceptor*, and indorsers accrues to the holder."

To be a right as far as an acceptor is concerned, it must be a right of action, for it cannot mean a right to give notice of dishonour, for that is not required—the acceptor being in default by his own act. The words then would be meaningless as to acceptor. Is not that the better construction which gives to each word significance and meaning and imparts a right as unpausing as it is forceful?

Of course a holder's right of action against a drawer or indorser only dates from the time when notice of dishonour is or ought to be received. *Castrique v. Bernabo*, 6 Q. B. 498. But, as the clause in s.-s. 6 of s. 51 in the Canadian Code gives the right of protest for dishonour, in case

of non-payment, at any time after three o'clock in the afternoon, where drawer and indorsers live in the same place, notice could be served upon them later in the afternoon and action immediately thereafter brought on the same day.

The words "an immediate right of recourse against the drawer and indorsers accrues to the holder," in s.-a. 2 of s. 43 of the Imperial Code, are used in case a bill is dishonoured by non-acceptance. Chalmers, in the 5th ed. of his work on Bills of Exchange, says, at page 140, "right of recourse" means right of "resort;" "but no right of action arises until he has performed the conditions precedent by giving notice of dishonour, and protesting, when necessary."

Parke, Baron, in *Whitehead v. Walker* (1842), 9 M. & W. at p. 516, thus defines the rule as to right of immediate action, in case a bill is dishonoured by non-acceptance:—

"For let us consider what is the nature of the right which the holder acquires on the default of the drawer to accept. It is clear (whatever might formerly have been considered on the subject) that by the non-acceptance, followed by the protest and notice, the holder acquires an immediate right of action against the drawer—a right of action, be it observed, not in respect of any special damage from the non-acceptance, but a right of action on the bill, i.e., a right of action to recover the full amount of the bill."

Lord Justice Lindley, in his judgment, says the point in *Kennedy v. Thomas* is not a new one; that it was actually decided in *Wells v. Giles*.

This last named case was an action on an inland bill of exchange. It appeared that the bill in question fell due on the 4th October and that the writ was issued at four o'clock in the afternoon of that day. The Court held, "the plaintiff had no cause of action before he sued out the writ. When the writ was issued his right of action was not complete. But it must be borne in mind that this case was decided when the statute 9 & 10 Wm. III. c. 17 was in force, which provided that inland bills could not be protested until after the expiration of the three days of grace, when made payable at a certain number of days, weeks, or months after the date thereof.

It would seem a just contention, it is claimed, that Kennedy v. Thomas is not a binding authority on our Courts, in view of s. 47, s.-s. 2, of the Canadian Code, coupled with s. 51, s.-s. 6 (b), of the like Code, which gives the right of protest after three o'clock in the afternoon of the day of dishonour.

As the profession was not satisfied with the decision of the Court of Appeal in the Vagliano Case, 23 Q. B. D. 243 (1889), until the authoritative decision of the House of Lords, [1891] A. C. 107, reversing the judgment of the Court of Appeal, set the question at rest; so, it is humbly submitted, they will regard Kennedy v. Thomas until in a position to say:—*Summa curia locuta est; causa finita est.*

St. John, N.B.

SILAS ALWARD.

## THE EVOLUTION OF LOCAL TAXATION IN ONTARIO.

*(Concluded.)*

### II. ASSESSMENT LEGISLATION.

**T**HE first Assessment Act of Upper Canada (33 Geo. III. c. 3) was passed in 1793.

The assessment consisted of a rough estimate of the means of each householder. The assessors divided the inhabitants of the locality for which they were appointed, into classes which were at first eight, namely:—

(1) Householders whom the assessors to the best of their knowledge and judgment believed to be possessed of real or personal property to their own use, to the value of £50, but less than £100;

(2) Householders possessed of property to the value of £100, but less than £150;

(3) Householders possessed of property to the value of £150, but less than £200;

(4) Householders possessed of property to the value of £200, but less than £250;

(5) Householders possessed of property to the value of £250, but less than £300;

(6) Householders possessed of property to the value of £300, but less than £350;

(7) Householders possessed of property to the value of £350, but less than £400;

(8) Householders possessed of property to the value of £400 and upwards.

Those whose property was less than £50 in value belonged to the "Excused List."

By an Act of the following year, 1794 (34 Geo. III. c. 6, s. 1), there were added two other classes:

(9) Householders possessed of property to the value of £450, but less than £500;



(10) Householders possessed of property to the value of £500, but less than £550;

Also an "Upper List," comprising householders possessing more than £500;

And an "Under List," which took the place of the former "Excused List" (s. 6).

The assessors "fixed" a copy of the lists on the church door, or on some other place of public resort in the parish, township, etc., transmitted a signed copy to the clerk of the peace, and were required to present, within six weeks from their appointment, their lists to two justices of the peace, and the allowance of the list by the justices constituted the authority of the collectors to demand from each person the rates payable by him (s. 10).

An appeal to the justices at the next following Quarter Sessions was given to anyone complaining of his assessment (s. 10).

The collectors paid over the moneys collected to the treasurer of the district, and received 3 per cent. on their collections as their remuneration (s. 20).

The treasurer was appointed by the Quarter Sessions and received as his remuneration 3 per cent. on all moneys received (s. 25).

For two years after 33 Geo. III. c. 3, the various classes paid (s. 12) a fixed rate, as follows:

Class (1) ..... 2s. 6d.

Class (2) ..... 5s. 0d.

and so on as to each class, increasing each time by 2s. 6d. until there is reached the classes added by 34 Geo. III. c. 6, ss. 3-5.

Class (9) ..... £1 2s. 6d.

Class (10) ..... 1 5s. 0d.

Upper List ..... 5s. 0d. for every £100.

After 1795 the amount to be raised was fixed by an estimate made by the Quarter Sessions, in April of each year, of the sum necessary to defray the expenses of the district for the year; and the justices were required to decide at the same Session whether a full rate of the amounts above men-

tioned, or if not, what aliquot part of a full rate, was necessary to be levied (s. 28).

No new assessment was to be made until three-quarters of the preceding rate had been expended (s. 29).

The persons upon the "Under List" (the former Excused List) were required to contribute towards the "public stock" of the district, 2s. as a maximum, to be "proportionably diminished" in case it was not found necessary to impose the entire rate (s. 6).

In 1803 this first and simple method of a rough estimate of each person's wealth was abandoned, and an assessment roll was required to be made out classifying the property which was to be subject to assessment. The values to be set upon rateable property were fixed by the Act.

The Assessment Roll, under 43 Geo. III. c. 12, with the valuations fixed by the Act, was as follows:

Acres of land—

Cultivated (arable, meadow, or orchard) . . . £1 per acre.  
Uncultivated . . . . . 1s. " (a)

Town lots (in the towns of Sandwich, Amherstburg, Queenston, Niagara, York, Kingston, Johnstown, and Cornwall) (b) . . . . £10 each

Houses in towns (having two fireplaces or less). 40 "

Houses in the country (having two fireplaces and no more) . . . . . 40 "

Additional fireplaces (town or country) . . . . 10 "

Grist Mills, wrought by water—

Having one pair of stones . . . . . 150 "

Additional pairs of stones . . . . . 300 "

Saw mills . . . . . 100 "

Merchants' shops . . . . . 200 "

Storehouses for reception of merchandise . . . 100 "

(a) Made 2s. by 47 Geo. III. c. 12, and 4s. by 51 Geo. III. c. 8.

(b) Amherstburg disappears as a town with special rate upon its lots in the roll of 1811. Lots in Kingston, York, Niagara, and Queenston became valued at £20 in 1814 (51 Geo. III. c. 8), and £50 in 1819 (59 Geo. III. c. 7); Belleville, Brockville, and Bath appear as special rated towns in 1819, and lots in Cornwall, Sandwich, Johnstown, and Belleville are rated at £25 each, in Brockville at £30 each, and in Bath at £20 each.

Horses (3 years old and upwards) . . . . .	£8 per head
Oxen (4 years old and upwards) . . . . .	4 “
Milch cows . . . . .	3 “
Young horned cattle . . . . .	1 “
Swine (1 year old and upwards) . . . . .	10s.
Taverns (over and above the rate payable for same as a house) . . . . .	£100
Stillts . . . . .	£1 per gal. capacity.

Lists of rateable property were required to be furnished by resident inhabitants to the assessor upon demand by him. (43 Geo. III. c. 12, s. 3.)

In 1807 (by 47 Geo. III. c. 7) the following items were added to the Assessment Roll, all values still being fixed by statute, though slightly raised in some cases.

#### Houses—

Built of round logs . . . . .	£ 15
Built of squared or hewed timber on two sides, 1 storey, with not more than 2 fireplaces . . . . .	20
Additional fireplaces . . . . .	4
Built of square timber, 2 storeys . . . . .	30
Additional fire places . . . . .	8
Frame, under two storeys . . . . .	35
Additional fireplaces . . . . .	5
Brick or stone, of one storey, with not more than 2 fireplaces . . . . .	40
Additional fireplaces . . . . .	10
Framed, brick, or stone, 2 storeys . . . . .	60
Additional fireplaces . . . . .	10
(Every stove erected in a room where there is no fireplace to be deemed a fireplace.)	
Grist mills, wrought by wind . . . . .	100
Additional for each pair of stones . . . . .	50
Stone horses (made £199 by 51 Geo. III. c. 8, with provisions for rating such horses brought into the township after the completion of the roll) . . . . .	200
Billiard tables . . . . .	200
Vessels sailing of 8 tons burthen and upwards . . . . .	50
Further amending Acts are 51 Geo. III. c. 8 and 55 Geo.	

III. c. 5.

In 1819 the following items were added to the Assessment Roll (by 59 Geo. III. c. 7, s. 2):

Close carriages, with two wheels, kept for pleasure..	£100
Open carriages, kept for pleasure only, with four wheels . . . . .	25
Curricles, gigs, or other carriages with two wheels, for pleasure . . . . .	20
Waggons, for pleasure . . . . .	15

The remuneration allowed to assessors was a percentage of 3 per cent. on the amount raised. (43 Geo. III. c. 12, s. 4.)

Under all these Acts, after 1803, the Magistrates in Quarter Sessions were the local authority which exercised supervision over assessors, heard assessment appeals, estimated the annual expenditure, fixed the rate, appointed the treasurer, and audited his accounts, in fact exercised in regard to such matters all the functions of modern municipal councils and courts of revision.

Under their supervision, too, rolls for collectors were prepared, certified by the clerk of the peace, and sent by him to the various collectors. (43 Geo. III. c. 12, s. 55.)

By the Act of 1819 (59 Geo. III. 2nd sess., c. 7, s. 7), continuing merely in that respect the Act of 1803 (43 Geo. III. c. 12, s. 5), the sums leviable in any one year were limited to 1 penny in the pound on the assessed value.

In the Home District in 1810 and 1811 the estimated expenditure would appear to have been about the full amount leviable, for in both those years the Sessions directed that a full rate should be levied. In 1798, for the last time apparently, less than a full rate (viz., five-eighths of a rate) was directed to be levied (x).

(x) The rolls of 1798 and 1799 will probably give a fair idea of the distribution of the ratepayers of the Home District (which then would appear to have consisted to all intents and purposes of the townships of York, Vaughan, and Markham and the town of York) under the Assessment Acts of 1793 and 1794.

The abstracts of the rolls in the office of the clerk of the peace shew as follows:—

Class.	No. of Persons assessed.	
	1798	1799
Under List .....	16	42
Class 1 (£50 to £100).....	26	70
" 2 (£100 to £150).....	35	36
" 3 (£150 to £200).....	11	24
(In the intermediate classes the Nos. are insignificant)		
Class 10 (£500 to £550) .....	11	8
Upper List (above £500) .....	3	15
Total .....	127	224

The rolls for the town of York for 1809, 1810, and 1811, containing itemized property as provided by the Act of 1803, shew amongst other things the following particulars:—

	1809	1810	1811
Acres of uncultivated land .....	92,697	90,238	69,208
Acres of cultivated land .....	764	960	703
Town lots .....	172	150	170
Houses of round logs.....	14	18	14
Houses of square timber (1 storey) .....	11	9	3
Houses of square timber (2 storeys) .....	2	1	1
Frame houses (under 2 storeys) .....	55	60	70
Frame houses (2 storeys) .....	25	—	—
Frame, brick, or stone houses (2 storeys) .....	—	21	26
Brick houses (1 storey) .....	—	1	1
Merchants' shops .....	—	11	13
Storehouses ..	—	4	4

	1809.	1810.	1811.
Stills (a) ....	58 gals.	none	none
Billiard tables (b) .....	2	none	none
Vessels of 8 tons and upwards.....	1	3	—

(a) Though stills do not appear on the rolls of the town of York for 1810 and 1811, they seem to have flourished in the surrounding townships, for example:—

	1809	1810	1811
Township of York .....	307 gals.	304 gals.	306 gals.
Township of Markham .....	300	558	400
Township of Whitchurch .....	396	396	396

(b) In 1808, also, two billiard tables were assessed.

The following compilation from the abstracts of rolls and returns of township clerks will shew something as to the growth of the Home District between 1798 and 1811.

Year.	No. of Ratepayers.	Population (a)	Aggregate valuation of assessed property.		Total amount levied.		
			£	s. d.	£	s. d.	
1798 (b)	127	No State't	.....		25	16	8 (h)
1799	224	"	.....		45	18	0
1800 (c)	254	1127	.....		81	5	6
1801 (d)	592	2788	.....		154	13	0
1802 (e)	615	3370	.....		214	9	6
1803 (f)	490	2328	£33,095	12 0	187	17	0
1804	(g)	3378	47,091	14 0	214	6	7½ (i)
1805	.....	3784	49,704	13 0	219	13	2
1806	.....	No State't	57,001	19 0	248	14	0½
1807	.....	4898	85,945	12 0	366	7	10½
1808	.....	No State't	101,567	7 0	436	0	0
1809	.....	6171	107,378	18 0	497	5	0
1810	.....	No State't	115,166	10 0	526	19	4
1811	.....	"	126,013	19 6	572	1	1½

The Act of 1819, above mentioned, which continued with amendments the Acts then in force for 8 years, was made permanent by 6 Geo. IV. c. 7, and remained in force until 1850.

In 1850 (13 & 14 Vict. c. 67) a further extension of the subjects of taxation was made, and it was enacted (s. 1) that all land and all personal property, as defined in the Act, whether owned by individuals, co-partners, or corporations, should be liable to taxation, subject to specified exemptions.

(a) From the returns by the township clerks. See 33 Geo. III. c. 2, s. 7.

(b) The returns are only from town of York and townships of York, Vaughan, and Markham.

(c) Includes additional township of Etobicoke, Scarborough, King, and Whitchurch.

(d) Includes additional townships of Beverley, the Flamboroughs, and Clarke, Cramahe, Darlington, Haldimand, Hamilton, Hope, Murray, and Percy, afterwards included in the District of Newcastle.

(e) This year the Act 42 Geo. III. c. 2, created the District of Newcastle and the townships of Cramahe, Clarke, Darlington, Haldimand, Hamilton, Hope, Murray, and Percy, were detached from the Home District and included in the new district.

(f) No returns this year from Beverley or the two Flamboroughs.

(g) After 1803 the number of ratepayers does not appear in the abstract. The forms of roll under the Assessment Act of 1803 had columns only for the different kinds of property assessable.

(h) Five-eighths of a rate only levied.

(i) After 1803 the amount of the "wages" of members of the Legislative Assembly (about £50) is added to the ordinary rate. See 43 Geo. III. c. 11.

The exemptions are few, comprising Crown and public property, places of worship or for burial, and property held for certain schools and colleges.

"Land" has practically the same meaning as "real estate" has under the present Ontario Act (s. 2).

"Personal property" is still confined to certain enumerated kinds of property, and includes:

Horses of 3 years old and upwards.

Neat cattle of 3 years old and upwards.

Pleasure carriages of all descriptions, and also carriages kept for hire.

The average stock of goods on hand of every merchant, trader or dealer, manufacturer, tradesman or mechanic, such average stock to be considered to be the mean between the highest and the lowest amount of goods on hand at any time during the year.

The amount of all stocks or shares in steamers, schooners or other water craft employed in the conveyance of freight or passengers, and owned within the municipality (s. 3 and sched. A).

These were, it would seem, the ostensible forms of wealth of that day. The agriculturist, the seller of merchandise by wholesale and retail, and after a time the vessel owner, represented the wealthy men. The manufacturer is named, but no doubt was still only in a comparatively small way of business. But there was by this time an increasing class comprehending persons without any particular assessable personal property, who, nevertheless, were enjoying an income from some calling not requiring land, cattle, capital, or stock in trade. The case of such persons was provided for by the provision that no person deriving income from any trade, calling, office, or profession exceeding £50 per annum should be assessed for a less sum as the amount of his net taxable personal property than the amount derived from such income during the year then last past, and such last year's income was to be held to be his net taxable personal property, unless he had other taxable personal property of an equal or greater amount (13 & 14 V. c. 67, s. 4). The principle of this enactment has been continued to the present day.

Section 21 contains the provision that "all real and personal property liable to taxation shall be estimated by the assessors at its full value (or full yearly value as the case may be) as they would appraise the same in payment of a just debt due from a solvent debtor." This clause has been continued till the present time and has been the foundation of the so-called "scrap iron assessment" decisions of the Courts.

In townships and counties the actual value, but in cities, towns, and villages the yearly value, of land was required to be assessed, and the yearly value of taxable personal property was defined to be 6 per cent. on the assessed actual value (s. 11).

The adoption of the General Property Tax occurred in 1853, probably following the current of legislation in the United States. In that year the Act 16 V. c. 182 was passed, repealing 13 & 14 V. c. 67, and an amending Act, 14 & 15 V. c. 110, and it was enacted (s. 2) that (subject to specified exemptions) all land and personal property in Upper Canada should be liable to taxation.

"Land" was defined as it is in the Act of the present day.

"Personal property" was made to include all goods, chattels, shares in incorporated companies, money, notes, accounts, and debts, at their full value, and all other property, except land, as above defined, and property exempted.

A sliding scale of allowances in the assessment of personal property was in effect provided by s. 4.

With occasional amendment this Act lasted until 1866, and in that year a new consolidation was made (29 & 30 V. c. 53) in which (s. 10) the change was made of requiring actual, instead of annual, values of land to be assessed in all municipalities, instead of as theretofore only in counties and townships.

The substance of the last Act with the accretions of subsequent years constitutes the Assessment Act of Ontario to-day, (R. S. O. 1897 c. 224).

These various steps which legislation in regard to local taxation has taken have been thus set out, in their perhaps



tedious detail, in order to shew the gradual process by which, during a century of assessment, the General Property Tax has been evolved. As in many other countries, the aim of legislation has been to make all who should pay, share the burden of taxation in proportion to their ability to pay, and, roughly speaking, the property or assets of each person have been regarded as the common basis of assessment by regard to which taxes should be paid. As the nature of the prevailing property of the community changed from time to time the assessment roll changed with it, legislation marching with the growth of the community.

During the period of the opening of the country the settlers on the land were the natural taxpayers, and they were at first roughly classified according to their general property as householders. Amongst the Romans in their early days of taxation, property consisted of land and houses, slaves, cattle, etc., capital attached to land; so with the backwoodsman, his wealth was in his land and house, his oxen, horses, cattle, sheep.

At first the assessor could perhaps sit down at home and make out his roll, estimating his neighbour's property, and "adding his own," as the Act directed. He knew every horse on every farm for miles around. He had milked his neighbour's cows and driven in his flocks and cattle when their owner was down with the ague, and their increase or death was the subject of conversation at the church gate or the logging bee.

Very soon the roll contains more than acquaintances. Inquiries have become necessary; subjects of wealth are itemized; lists of their possessions are required from the ratepayers, on the demand of the assessor. Houses at first were sufficiently classified as houses in town and houses in the country, their value varying according to the number of fireplaces; but soon houses shew signs of varied wealth. Besides the primitive house built of "round logs," there have come in more ostentatious residences of logs "hewed on both sides," or of "square timber," or even mansions of brick and stone, sometimes of more than a single storey and having many "fireplaces." The assessment rolls begin to discriminate;

£20, £30, £35, even £60 houses are entered there. Then the £15 round log house disappears from the roll. Wealth is still measured by land, horses, oxen, and cows, but there are indications of the coming real estate owner. Certain towns are *oppida digito monstranda*. In Queenston, Kingston, Johnstown, Niagara, and York, at a very early date, lots are high priced, though corner lots have not yet a peculiar value in the assessor's eye. Life, too, is evidently not all work. "Close carriages," "curricles," "gigs," and even "waggons" "for pleasure" are taxed. One curious incongruity is worthy of notice; even in the era of the round log house the billiard table was a mark for taxation.

After a time merchants' stocks in trade, and stocks and shares in steamers, and water craft cannot be overlooked.

At last, in 1853, comes the General Property Tax, when the assessment roll no longer particularizes items of wealth or instruments of pleasure. Everything beyond certain specified exemptions is swept into the net of taxation.

Perhaps at first, under the Act of 1853, all property, personal as well as real, was fairly well discovered and assessed; but within a few years, at any rate, the process must have begun by which land gradually came to bear more than its due share of taxation.

Kinds of wealth in personal property increased, and, though taxable by the letter of the law, became increasingly hard to find, for assessment. The towns once notable for high prices in real estate, cease to have any invidious pre-eminence. Some of them become cities. Hamilton and London arise. Johnstown and Bath disappear. Cities and towns contain thousands of inhabitants whose connection with the land is of the slightest description, and whose daily earnings are their only wealth. While personalty becomes more and more invisible, the land is always in the assessor's sight, and with increasing taxation bears an increasing proportion of the aggregate of taxes. The limit of endurance in that respect seems to have been reached with the end of the nineteenth century. The real estate owner, as well as the few taxed in respect of their personal property, have begun to cry out that some relief for them must be found. Although in cities and

towns it cannot be doubted that the aggregate wealth in personal property far exceeds the value of land, in no case during at least the last fifteen years has more than ten per cent. of the whole amount of taxes been paid by personal property. (a)

At the beginning of the 19th century the community was in the main agricultural. Some few other classes there were, but they were such that the common basis of assessment employed was a fairly satisfactory one, and something like equality in taxation prevailed. If there was inequality anywhere, it excited no general complaint, because the whole burden was comparatively slight.

As years passed, the character of the community changed. We are not now only an agricultural people. Though agriculture still is the occupation of large numbers, we are more and more inclining towards the industrial arts, and the basis of taxation suitable in an agricultural, has become unsuitable in an industrial, era.

Some former classes of society have so grown and become so modified that what was a fair common basis of assessment amongst them is so no longer. Enterprises of all kinds, formerly dependent upon individual exertion, have come to be in the hands of corporations, and the wealth of private persons is to be found in forms and places not contemplated in the earlier days. Besides all such reasons, the burden of taxation has so increased, to meet the expenditure necessarily attending a more complex civilization, that inequalities formerly slight and unconsidered are now very perceptible. The result is a general demand for a different basis of assessment.

The same thing has occurred in the United States, and although there the crisis really came sooner, and the need for a change is perhaps even more pressing than in Ontario, no very radical change has yet been anywhere adopted. The States as a whole still cling to the General Property Tax. In some cases this is due partly to difficulties attending the alteration of the Constitution of the particular State, partly also to the fact that everywhere strenuous efforts are being

(a) See Report of the Ontario Assessment Commission, 1903, p. 39.

made to tax corporations to the full, which brings temporary content; but the chief cause would seem to be that the national mind is still unconvinced that those are right who say that even though all property be taxed, the real incidence of the tax is not necessarily on the owners of the property, and that by such a system all do not necessarily share the burden of taxation in due proportion.

The General Property Tax is not so ingrained in the people of Ontario. We have, also, the experience of the old country and of sister Provinces in regard to other systems. We look to England for many things, and we see there a system of local taxation not depending upon the General Property Tax. Though there are considerations which would prevent our accepting the English system in its entirety, we see many things capable of being adapted to our circumstances and conditions. The Royal Commission appointed in Ontario to investigate municipal assessment and taxation was the outcome of the general dissatisfaction with the existing system. That Commission more than a year ago made its final report. It made recommendations for reform which go to the root of many of the existing evils, and a draft Act to carry out the proposed reforms accompanied the report. That Act was introduced as a bill and came up for discussion in the Legislature this year, and is still under consideration by a Special Committee which, notwithstanding the prorogation of the Legislature, is to meet again in the coming autumn.

THOMAS LANGTON.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Bills of Exchange.]**—The judgment of the Court of Appeal in *Capital and Counties Bank v. Gordon*, 18 T. L. R. 157, noted 22 C. L. T. 68, as to crossed cheques, was affirmed by the House of Lords: 19 T. L. R. 462.

**Building Contract.]**—*British Thomson Houston Co. v. West Brothers*, 19 T. L. R. 493, was an action to recover from builders penalties for delay in completing the plaintiffs' building. The contract in question provided that the architect might extend the time for completion of the work, but did not expressly give him power to deal with penalties. He gave the defendants a certificate that a certain sum was due "in settlement of contract," and the defendants contended as a defence in law that this must be taken to imply an extension of the time for completion. It was held, however, that whether the architect had or had not granted an extension, was a question of fact, and that the certificate merely raised a presumption which might be rebutted, so that on the point of law the plaintiffs were entitled to succeed.

**Company.]**—The judgment in the important case of *In re Innes & Co.*, 19 T. L. R. 226, noted ante p. 155, was reversed by the Court of Appeal: 19 T. L. R. 477. In the Court below certain holders of shares alleged to have been paid up by the transfer of property were held liable as contributories on the ground that the property transferred was not in fact of anything like the value attributed to it, and had not really been taken by the company at this value. The Court of Appeal held, however, that as the bona fides of the transaction had not been impeached, and as the company had in fact obtained the property it intended to purchase, and all the shareholders had assented to and taken part in the transaction, the question of adequacy was of no importance.

\*Including the cases to No. 26, Vol. 19, to be published June 19, 1903.

**Conflict of Laws.]**—In *Kaufman v. Gerson*, 19 T. L. R. 455, an agreement entered into in France by persons domiciled there and intended to be performed there, was held to be enforceable in England, though having been entered into in connection with the compromise of a criminal offence and under legal duress, it would, if entered into in England, have been invalid on grounds of public policy. A contract in violation of morality or positive law would be on a different footing.

**Contract.]**—*Griffith v. Brymer*, 19 T. L. R. 434, is still another "coronation seat" case. The agreement in question had been made after the postponement had been announced, both parties being ignorant of this fact. It was held that there was such a mistake as to the facts as to render the contract void, and the hirer of the seats was given judgment for the amount paid.—*Scott v. Coulson*, 19 T. L. R. 440, was a somewhat similar case, in which the judgment reported 19 T. L. R. 162, noted ante p. 98, was affirmed. It was the case of an assignment of a policy on the life of a third person, both parties to the contract erroneously believing the assured to be alive, though before the formal assignment was executed one party received information of the death and did not disclose the fact. The contract and the assignment founded upon it were set aside.

**Copyright.]**—*Boucas v. Cooke*, 19 T. L. R. 475, deals with the question of copyright in a photograph, the decision being that in the ordinary case of customer and photographer the effect of s. 1 of the Fine Arts Copyright Act, 1862, is to vest the copyright in the customer. The Canadian Act, R. S. C. c. 62, is much narrower in its terms, but the customer could, even without the statutory right, restrain reproduction of his picture on the ground that reproduction would be a breach of an implied contract not to reproduce without consent.

**Defamation.]**—*McQuire v. Western Morning News Co.*, 19 T. L. R. 471, is an interesting case as to the limits of "fair comment" on a theatrical performance. "Sorry stuff," and

“vulgar songs” certainly seem mild criticism upon which to base the action of libel which failed.

**Evidence.]**—In *West v. Sackville*, 19 T. L. R. 450, the plaintiff, who claimed to be entitled in remainder to certain estates, was held to have the right to bring an action to perpetuate testimony as to his status.

**False Imprisonment.]**—In *Syed Mahamad Yusuf-ud-din v. Secretary of State for India*, 19 T. L. R. 496, it is decided that where a prisoner is arrested and released on bail, and then the warrant is set aside, the time for bringing an action for false imprisonment runs from the time of the release on bail, and not from the time of the setting aside of the warrant.

**Gas Inspection Act.]**—A gas company’s special Act, in question in *London County Council v. South Metropolitan Gas Co.*, 19 T. L. R. 441, provided that a gas examiner should test the gas “daily.” It was held that the examiner was entitled to test the gas on Sunday. Compare the Gas Inspection Act, R. S. C. c. 101, s. 31.

**Landlord and Tenant.]**—*Stockdale v. Ascherberg*, 19 T. L. R. 457, is a case shewing the danger of unlimited covenants in a lease. The lessee in a lease for three years at a yearly rental of £55 covenanted to pay “all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises,” and also “to keep and leave the premises (including the fixtures) in as good condition as they are now in, reasonable wear and tear excepted.” He was held liable to pay to the lessor £83 10s., the cost of putting the drainage system of the house in repair, as ordered by the local health authority. Compare *Lumby v. Faupel*, 19 T. L. R. 426, noted ante p. 217.—That a man cannot be both vendor and purchaser is the short point decided in *Moore Nettlefold and Co. v. Singer Manufacturing Co.*, 19 T. L. R. 489, the result being that landlords who had assumed to buy a sewing machine at a sale under distress proceedings were held not to have acquired any title to it.—In *Wilson v. Twamley*, 19 T. L. R. 504, the meaning and effect of a covenant in a lease not

to "suffer" an act to be done was considered. The lessee of a public house covenanted not to do or suffer to be done on the premises any act whereby the license might be forfeited. He made a sub-lease, the sub-lessee giving a similar covenant, but afterwards being guilty of an offence which resulted in the loss of the license. It was held that the lessee had not suffered this act to be done.—The judgment in *Wright v. Lawson*, 19 T. L. R. 203, noted ante p. 98, that a covenant to repair did not compel a lessee to build what would be in effect a new bay window, in place of one condemned as unsafe, was affirmed by the Court of Appeal: 19 T. L. R. 510—Bringing an action for forfeiture because of assignment without leave is held in *Serjeant v. Nash Field and Co.*, 19 T. L. R. 510, to be an unequivocal determination of the lease, and therefore a distress by the lessee's mortgagee after the service of the writ was held to be unjustifiable.

**Life Insurance.**—It was held in *Horse v. Pearl Life Assurance Co.*, 19 T. L. R. 474, that a person taking out a policy on the life of a third person on the innocent representation of an agent of the company that there was an insurable interest, was entitled to recover back premiums, the policy being in fact void.

**Master and Servant.**—In *Sharpe v. Midland R. W. Co.*, 19 T. L. R. 437, an allowance for lodging paid to an employee when away from home on his employers' service, was held to be part of his "earnings," and therefore to be taken into consideration in arriving at the amount of compensation recoverable. See R. S. O. 1897 c. 160, s. 7—In *Maynard v. Peter Robinson*, 19 T. L. R. 492, a seamstress who worked at a sewing machine and heated irons on a stove and ironed materials was held to be "engaged in manual labour" within the meaning of s. 10 of the Employers Act, 1875, with which s. 2 (3) of the Workmen's Compensation Act, R. S. O. 1897 c. 160, is almost identical.

**Mortgage.**—The judgment of the Court of Appeal in *Bradley v. Carritt*, 17 T. L. R. 641, noted 21 C. L. T. 413, was



reversed by the House of Lords, 19 T. L. R. 466, the agreement in question, by which a mortgagor of shares agreed in effect that sales of the company's products should be made through the mortgagee as broker, being held invalid as a clog on the equity of redemption.

**Trade Name.]**—In *Faulder v. Rushton*, 19 T. L. R. 452, the word "silverpan," though originally descriptive of the vessels in which the plaintiffs' jams were cooked, was held to have acquired a secondary meaning as indicating any jams manufactured by them, and the defendants were restrained from using it.

**Undue Influence.]**—*Cavendish v. Strutt*, 19 T. L. R. 483, is an extraordinary case of undue influence exercised by an experienced man of the world upon a young man of careless, unbusinesslike disposition, resulting in the making of a settlement by which benefits were conferred upon the former.

**Way.]**—The judgment of the Court of Appeal in *Gardner v. Hodgson's Kingston Brewery Co.*, 17 T. L. R. 380, noted 21 C. L. T. 235, was affirmed by the House of Lords: 19 T. L. R. 458. The plaintiff, who contended that she had acquired a right of way by prescription, had for many years paid a small sum each year to the owners of the servient tenement, as a contribution, she contended, towards keeping the yard in question in repair. It was held, however, that though permission to use the way was not expressly asked each year, the proper inference was that each annual payment was made for the use of the way during the preceding year, and that a prescriptive right had not been acquired.

**Will.]**—Under the devise in question in *In re McCalmont*, 19 T. L. R. 490, of a house "together with the furniture and contents therein and appertaining thereto," medals, coins, unset brilliants, carriages, and yacht linen in the house, of a yacht formerly owned by the testator, were held to pass; but not money, guns, debentures, scrip, and promissory notes.

## EDITORIAL REVIEW.

**The Gamey Charges.**

The charges made by Mr. Gamey, member for Manitoulin in the Legislative Assembly of Ontario, against Mr. Stratton, a member of the Executive Council of the Province, and against the other members of the Government, were, upon a strictly party vote, referred for investigation and report to a commission of Judges selected by the Government. The members of the Opposition in the House took the ground that the investigation should be by the House itself or a committee of the House, but they were naturally overborne by the majority. The whole people of the Province took an intense interest in the investigation, and the lengthy newspaper reports of the proceedings were eagerly read from day to day as the inquiry proceeded. The Judges selected were the Chancellor of Ontario and the Chief Justice of the King's Bench. It was argued in the House and by newspapers that the rules of evidence observed in Courts would cramp the inquiry and defeat its object. The Commissioners, however, let in almost all the evidence that was offered, and a vast quantity of testimony was taken. No valid objection has been urged to the conduct of the inquiry, and it is safe to say that the evidence was at least as well brought out as it would have been before a committee of the House. Mr. Gamey's main charge was that he had been paid by Mr. Stratton two sums of \$3,000 and \$1,000 as the price of the transfer of his support from the Opposition to the Government, one-half of each of which sums he alleged that he had paid to one Frank Sullivan, who was, according to Gamey's story, an intermediary between himself and Mr. Stratton. Gamey was undoubtedly in possession of \$1,500 and \$500, and it is more than probable that he received these sums from some source outside of his own proper business, but the evidence, leaving out his own, failed to shew the source. The learned Commissioners came to the conclusion that the charges against Mr. Stratton and the other members of the Government were

disproved, and it is difficult to see what other conclusion they could have come to upon the evidence. They so reported, and their report was adopted by the Assembly, after a long debate, again upon a strictly party vote. The debate was chiefly remarkable for the abuse and charges of partiality heaped upon the Commissioners from one side of the House, and the curious argument advanced from the other side, that, while the House was actually debating the question whether the report should be adopted, upon a motion made to that effect, it was at the same time improper to criticize the report. It is impossible to see how the motion could be intelligently debated on the merits without argument as to whether the report was justified by the evidence, and that necessarily involved criticism.

In the course which the debate took the Government supporters did, in effect, seek to justify the report by reference to the evidence, and the Opposition were surely as much entitled to urge rejection, also by reference to the evidence. The license taken by the Opposition members in their abuse of the Commissioners went far beyond anything that we ever heard of in any public body. And the tone of the debate, on the one side at least, in scurrility and vulgarity, transcended belief. But it was all beside the question. There was the evidence, and there was the report. It was for the House to adopt or reject the findings of the Commissioners. If the report was a dishonest one, as was freely said, the House should have rejected it. If the report had found the charges proved up to the hilt, the House could have rejected it, and probably would have done so—upon a strictly party vote. The whole thing is a deplorable scandal, arising out of our debasing party politics. Incidentally the inquiry revealed matters most damaging to the reputation of the Government. The arranging of “saw-offs” of election protests, the trafficking in timber limits, the admitted negotiations between Gamey and Stratton with regard to patronage, the arrangements for the publication of an “interview” with Gamey, all disclosed by the evidence before the Commissioners, ought to shock the minds of the people; but all these, of course, are insignificant in view of the principal matter. Neither

the Commissioners nor the House have been able to find out "where the money came from." It was paid to Gamey by Stratton or by some one else on behalf of the Government or the Liberal party; or, on the other hand, Gamey invented the story, and the money was supplied by some one on the Conservative side for him to produce in assumed proof of the truth of his story. No other plausible theory is suggested. Taking either one or the other, the people of the Province may well hide their heads in shame. To such a pass has "party" brought us. The attack on the motives and character of the two Commissioners is, also, deplorable, and while utterly groundless, as every impartial person must admit, cannot fail to weaken the confidence of the public in the judiciary. Most persons are only too willing to believe evil of others, especially of those in high places.

#### **Additions to the Ontario Bench.**

Readers of this journal will doubtless approve of the Act recently passed by the Ontario Legislature increasing the number of Judges in the High Court of Justice. There are to be two additional Judges, making the whole number twelve. The two new Judges and the fourth Judge of the Chancery Division are to form a new Division, to be called, we understand, the Fourth Division. One of them will have the title of Chief Justice of the Fourth Division, and presumably the extra emoluments of a Chief Justice. Indeed the only reason that can be suggested for creating a Fourth Division is that there may be a Chief Justice. A force of twelve Judges is not too strong for the work, remembering Lord Russell's plea for a margin of safety in the strength of the judicial staff. Illnesses, family afflictions, vacancies, and outside engagements in the quasi-judicial work of public inquiries, are the cause of many postponements and much dissatisfaction to litigants. If all Divisional Courts in the future are composed of three Judges, if the circuit work is not scamped or hurried, and if much needed assistance is given in the Court of Appeal, the increase of strength will be very popular. The Act is not to come into force till the 1st January, 1904. Meantime there is a vacancy in the High

Court; Mr. Justice Robertson's place has not been filled up; it is to be hoped that we are not to go on till next year with nine Judges, when twelve have been declared necessary.

#### **The Court of Appeal.**

It has been announced that the Court of Appeal will sit in two divisions in September next. The arrears in that Court are very considerable. One Judge will be borrowed from the High Court, and the two divisions will each be composed of three Judges for the hearing of appeals from decisions of single Judges. It is to be hoped that the rule as to cases being proceeded with promptly in their order upon the list, will be strictly enforced.

#### **Appointment to the County Court Bench.**

Mr. C. W. Coulter, of Cayuga, has been appointed Judge of the County Court of Haldimand. He is, we understand, a good lawyer and likely to prove an excellent Judge. But he should have been appointed to another county. Mr. Haughton Lennox, M.P., on the 29th June, put a question to the Minister of Justice in the House of Commons as to why the practice of appointing County Court Judges from other counties had been departed from. An answer was promised on a future day. It will be looked for with interest.

#### **Exchequer Court of Canada.**

Special sittings of the Exchequer Court of Canada for the trial of cases, etc., have been fixed for the following times and places:—

At the court house in the city of St. John, N.B., commencing on Tuesday the 8th September, 1903, at 10 a.m.

At the court house in the city of Halifax, N.S., commencing on Tuesday the 15th September, 1903, at 10 a.m.

At the court house in the city of Winnipeg, Man., commencing on Tuesday the 29th September, 1903, at 10 a.m.

At the court house in the town of Calgary, N.W.T., commencing on Monday the 5th October, 1903, at 10 a.m.

At the court house in the city of Vancouver B.C., commencing on Monday the 12th October, 1903, at 10 a.m.

At the court house in the city of Victoria, B.C., commencing on Monday the 19th October, 1903, at 10 a.m.

**Amended Rules of Court.**

At a meeting of the Supreme Court of Judicature of Ontario, held on Saturday the 20th day of June, 1903, it was ordered that the following amendments to the Rules be adopted, viz.:

1242 (47). Rule 47 is hereby repealed and the following substituted therefor:

47 (1). A local Judge of the High Court shall in actions brought and proceedings taken in his county, possess the like powers of a Judge in the High Court in Court of Chambers, for hearing, determining and disposing of the following proceedings and matters, that is to say:

- (a) motions for judgment in undefended actions;
- (b) motions for the appointment of receivers after judgment by way of equitable execution;
- (c) application for leave to serve short notice of motion to be made before a Judge sitting in Court or in Chambers;
- (d) motions for judgment and all other motions, except matters and applications;
- (i) trials of actions;
- (ii) applications for taxed or increased costs under Rule 1146; and,
- (iii) motions for injunctions other than those provided for by Rule 46;)

where all parties agree that the same shall be heard, determined or disposed of before such local Judge, or where the solicitors for all parties reside in his county.

Provided always that where an infant or lunatic or person of unsound mind is concerned in any such proceedings or matters the powers conferred by this Rule shall not be exercised in case of an infant without the consent of the official guardian, and in the case of a lunatic or person of unsound mind without the consent of his committee or guardian, and provided also the like consent shall be requisite in the case of applications for payment of money out of Court and for dispensing with the payment of money into Court where an infant, lunatic or person of unsound mind is concerned.

(2) No order for the payment of money out of Court, or for dispensing with the payment of money into Court shall be acted upon unless a Judge of the High Court has manifested his approval thereof in manner provided by Rule 414.

(3) The judgment or order of the local Judge in any of the proceedings or matters in this Rule referred to shall be entered, signed, sealed and issued by the Deputy Clerk of the Crown, Deputy or Local Registrar of the county, as the case may require, and shall be and have the same force and effect and be enforceable in the same manner as a judgment or order of the High Court in the like case.

1243 (48). Rule 48 is hereby amended by substituting the letter (d) for the letter (c) in the second line.

1244 (139). Rule 139 is repealed and the following substituted therefor:

139. Where a plaintiff's claim is for or includes a debt or liquidated demand, the endorsement besides stating the nature of the claim shall state the amount claimed in respect of such debt or demand, and for costs respectively, and shall further state that upon payment thereof within the time allowed for appearance further proceedings will be stayed. Such statement may be according to Form No. 6. The defendant, notwithstanding that he makes such payment, may have the costs taxed, and if more than one-sixth be disallowed the plaintiff's solicitor shall pay the costs of taxation.

1245. Form No. 6 (section 3 of the Appendix) is amended by striking out the figure 8 and leaving a blank space between the words "within" and "days" in the third line, and omitting the words between brackets.

1246 (162). Clause (e) of Rule 162 is hereby repealed and the following substituted therefor:

(e) The action is founded on a judgment or on a breach within Ontario of a contract wherever made which is to be performed within Ontario or on a tort committed therein.

1247 (300). Rule 300 is hereby repealed and the following substituted therefor:

300. A plaintiff may, without leave, amend his statement of claim, whether endorsed on the writ or not, once, either

before the statement of defence has been delivered, or after it has been delivered and before the expiration of the time limited for reply, and before replying.

1248 (362). Rule 302 is hereby repealed and the following substituted therefor:

302. Where a plaintiff has amended his statement of claim under Rule 300 the opposite party shall plead thereto or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment, whichever shall last expire, and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

1249 (414). Rule 414 is hereby amended by adding thereto the following sub-section:

(2) An order dispensing with the payment of money into Court, unless it is made by a Judge of the Supreme Court, shall not be acted on unless or until a Judge of the High Court has manifested his approval thereof in manner provided by sub-section 1.

1250 (439). Rule 439 is hereby repealed and the following substituted therefor:

Rule 439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest and may be compelled to attend and testify in the same manner, upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided.

439 (a). In a case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness, except as hereinafter provided; but such examination shall not be used as evidence at the trial.



(2) After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.

439 (b). An examination shall not take place during the long vacation without an order of the Court or a Judge.

1251 (461). Sub-sections 2 and 3 of Rule 461 are hereby repealed.

1252 (881). Rule 881 is hereby repealed and the following substituted therefor:

881. Before the sale of lands under a writ of fieri facias, the sheriff shall publish once, not less than three months and not more than four months preceding the sale, an advertisement of sale in "The Ontario Gazette," specifying:

- (a) The particular property to be sold;
- (b) The name of the plaintiff and defendant;
- (c) The time and place of the intended sale;

(d) The name of the debtor whose interest is to be sold; and he shall in each week, for four weeks next preceding the sale, also publish such advertisement in a public newspaper of the county or district in which the lands lie; and he shall also for three months preceding the sale, put up and continue a notice of such sale in the office of the Clerk of the Peace, and on the door of the Court House or place in which the General Sessions of the Peace of the county or district is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day.

1253 (1146). Rule 1146 is hereby amended by adding thereto the following sub-section:

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements in accordance with sub-section 1, unless it is otherwise expressly provided by the order or judgment, or unless the Court or a Judge of the High Court otherwise directs.

Ordered that the foregoing Rules shall come into force and take effect on and after the 2nd day of September next.

**Recent American Decisions.**

*Attempt to Commit Crime.*—Mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, are held, in *Groves v. State* (Ga.), 59 L. R. A. 598, not to constitute an attempt to commit the crime.

*Evidence.*—The instruments, devices, or tokens used in the commission of a crime are held, in *State v. Edwards* (W. Va.), 59 L. R. A. 465, to be competent and legitimate evidence in the trial of the accused, and the taking of them from his person by an officer who has arrested him upon a charge of his having committed the crime is held not to be an illegal seizure. With this case is a note as to admissibility in evidence against accused of documents or other things taken from him.

*Ferry.*—The owner of a ferry is held, in *Sistersville Ferry Co. v. Russell* (W. Va.), 59 L. R. A. 513, not to be entitled to recover compensation for injury to his ferry flowing from loss of patronage incident to the establishment of a second ferry, either from the owner of the second ferry or the county. An extensive note to this case reviews the other authorities as to the establishment, regulation, and protection of ferries.

*Garnishment.*—A claim against a railway company for unliquidated damages for breach of a shipping contract is held, in *Waples-Platter Grocer Co. v. Texas & P. R. Co.* (Tex.), 59 L. R. A. 353, not to be subject to garnishment. All the other authorities on the garnishment of unliquidated claims are carefully collected and reviewed in a note to this case.

*Insurance.*—The innocence of an insured who was executed after conviction of a capital crime is held, in *Burt v. Union Central Life Ins. Co.* (C. C. App. 5th C.), 59 L. R. A. 393, not to change the rule that insurance cannot be recovered upon the life of a person who was executed for crime, even if the policy makes no provision for forfeiture on that account.

A contract to indemnify an employer against loss by reason of liability for accidental injuries to employees is held,

in *Frye v. Bath Gas and Electric Co. (Me.)*, 59 L. R. A. 444, not to inure to the benefit of an injured employee, so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment.

A provision of an insurance policy rendering it void if, without consent of the insurer, mechanics are employed in building, altering, or repairing the premises for more than fifteen days at any one time, is held, in *German Ins. Co. v. Hearne (C. C. App. 3rd C.)*, 59 L. R. A. 492, to be operative regardless of the reasonableness of the repairs.

*Necessary Sustenance—Medicine.*—Evidence that a father refused to permit medicine to be administered to one of his minor children while sick is held, in *Justice v. State (Ga.)*, 59 L. R. A. 601, not to support a conviction of the father for depriving the child of necessary sustenance within the meaning of a statute which declares such deprivation to be an offence against the laws of the State.

*Railway.*—No invitation to cross the yard of a railway company to reach show grounds is held, in *Clark v. Northern P. R. Co. (Wash.)*, 59 L. R. A. 508, to be given by the railway company by permitting a circus to exhibit on its vacant land adjoining its switch yard, so as to charge it with the duty of exercising care to protect people from danger, and render it liable to one injured by the operation of trains while attempting to cross the yard after having been expressly told to keep out, where the show grounds can be reached without danger by the highway.

A railway company is held, in *Ashworth v. Southern R. Co. (Ga.)*, 59 L. R. A. 592, to be liable for injury to a child of immature years who gets upon the running board of an engine as it enters a playground, according to a general custom of children playing there, well known to the railway employees, and who is injured while attempting to alight therefrom at a point where children have been, for a long time previous, in the habit of alighting, even though the employees in charge of the train had no actual knowledge of the child's presence upon the engine.

A railway company is held, in *Houston & T. C. R. Co. v. Phillio* (Tex.), 59 L. R. A. 392, to be under no obligation to protect persons who resort to its stations to aid the departure of friends who are to become passengers on its cars from assaults by persons lounging about the stations, although such duty may exist as to the intending passengers.

A railway company is held, in *Mabry v. City Electric R. Co.* (Ga.), 59 L. R. A. 590, to be liable in damages for injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby.

*Survivorship.*—In case of the death, in the same disaster, of a member of a mutual benefit society and the beneficiary named in the certificate, which provides that, in the event of the death of the beneficiary before the decease of the member, the benefit shall be paid to his heirs, it is held, in *Middeke v. Balder* (Ill.), 59 L. R. A. 653, that the representatives of the beneficiary must shew her survivorship or the fund will go to the heirs.

*Telegraph.*—A grandmother is held, in *Western U. Teleg. Co. v. Crocker* (Ala.), 59 L. R. A. 398, to be entitled to recover damages for mental anguish for failure to promptly deliver to her a telegraph announcing the serious illness of her grandchild.

Delivery of a telegram, directed to a person in care of a railway company at a certain place, to the ticket agent of the company there, after making extensive search for the sendee, is held, in *Lefler v. Western U. Telg. Co.* (N. C.), 59 L. R. A. 477, to relieve the telegraph company from further liability.

Loss sustained by performance of a contract closed at a price quoted in a telegram as changed in transmission, is held, in *Germain Fruit Co. v. Western U. Teleg. Co.* (Cal.), 59 L. R. A. 575, not to make the telegraph company liable, where the sendee, from his knowledge of the market, knew that a mistake must have occurred, and acted in bad faith, since, the contract not being binding upon the sender, it is held that he cannot voluntarily perform it and throw the loss on the company.

## CORRESPONDENCE.

**A Problem.**

*To the Editor of THE CANADIAN LAW TIMES:*

SIR,—In an action of trespass, the defendant justifies the acts complained of by asserting that the *locus in quo* is a public highway.

Three distinct claims are put forward by defendant:

- (a) Highway by dedication.
- (b) Highway by prescription.
- (c) That plaintiff is estopped (by his former conduct and representations) from denying the highway.

The trial Judge holds that there is no highway either by dedication or prescription, but gives judgment for defendant on ground of estoppel.

In the Court of Appeal, composed of three Judges, A., B., and C.:—

A. and B. hold there is no estoppel.

C. holds that there is estoppel.

A. and C. hold that there is no dedication.

B. holds that there is dedication.

B. and C. hold that there is no highway by prescription.

A. holds that there is a highway by prescription.

Each of the three Judges concludes his judgment as follows:—

A.—“Holding therefore that there is a highway by prescription—the defendant must succeed and appeal be dismissed.”

B.—“Holding that there is a highway by dedication, the appeal must be dismissed.”

C.—“Holding that there is a highway by estoppel, the appeal must be dismissed.”

What should the judgment of the *Court* have been?

In the actual case referred to judgment was entered for the respondent. It is submitted that the result of the several judgments of A., B., and C. should have been a judgment of the *Court* in favour of the appellant, i.e., the appellant has a majority of the Court with him, and against the respondent, on each of the three grounds on which the respondent bases his defence. In other words, there are in reality, *nine* judgments—three from each appellate Judge—and of the nine, six are in favour of the appellant.

I have stated this problem, which actually arose in practice, to many of my friends at the Bar, and it has produced an amusing diversity of opinion. Perhaps, Mr. Editor, you can solve it.

Yours faithfully,

X.Y.Z.

Vancouver, B.C., 24th June, 1903.

[The Judges agreed that there was a highway. If that was an answer to the action, the judgment was properly entered for the defendant.—ED.]

# THE CANADIAN LAW TIMES.

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AUGUST, 1903.

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## THE LABOURER AND THE LAW.

IN an interesting article in the Contemporary Review for March, 1903 (the title of which, with apologies to the first and true inventor, I have made bold to borrow), that very eminent lawyer and politician, the Right Honourable R. B. Haldane, K.C., M.P., uses these words: "Speaking for myself, I should be very sorry to be called on to tell a trade union secretary how he could conduct a strike lawfully. The only safe answer I could give would be that, having regard to the diverging opinions of the Judges, I did not know."

On the other hand, a very learned and eminent Judge, Chief Baron Palles, is reported to have said that it is now "almost impossible for even a tyro at the Bar to doubt what the law is in such cases."

These widely differing statements make it probably useful to trace briefly the history of the cases on this subject, so far as interference with contract is concerned, and to see what, if any, sure ground may be found as to the relations between the labourer and the law.

From very early days an attempt has been made to regulate the labour question by Parliament and by the Courts.

In A.D. 1349 the "Statute of Labourers" (23rd Edw. III.) was passed in consequence of the scarcity of labourers, caused by the plague known as the Black Death. The preamble

states that, "Because a great part of the people, and especially workmen and servants, have of late died of the pestilence, many, seeing the necessity of masters and great scarcity of servants, will not serve unless they may receive excessive wages, and some are rather willing to beg in idleness than by labour to get their living; we considering the grievous incommodities which of the lack especially of ploughmen and such labourers may hereafter come, have, etc., ordained." It is then enacted that every person, male or female, of whatever condition, free or bound, able in body and under sixty, not living by merchandise, nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not living in service, shall be compelled to enter into service when required on customary wages.

By s. 2 it is made penal by imprisonment for any mower, reaper, or other labourer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed, and no one is to receive or retain such offender in his service under the pain of imprisonment; the same wages as heretofore were to be paid in all cases.

This statute was repealed by 5 Eliz. c. 4, but the class of actions which had originated under it, continued as founded on common law.

In fact, however, as is pointed out in *Lumley v. Gye* (post), there was a right of action at common law apart from the statute; the argument based upon the analogy of the statute, which was much considered in *Lumley v. Gye*, received its quietus in *Bowen v. Hall* (post).

Wholesome advice was from time to time given by the Courts. In the case of *The King v. The Journeymen Tailors of Cambridge* (1721), 8 Mod. 11, an indictment against the defendants for a conspiracy amongst themselves to raise their wages, and that not to any excessive extent, the Court held that they were properly convicted: "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it."



Nor were the servants alone kept in check. In *Rex v. Hammond* (1799), 2 Esp. 718, which was an indictment for a similar conspiracy against journeymen shoemakers, it was stated in the course of the evidence that the demands of the journeymen were occasioned by some of the masters giving wages beyond what were the usual ones in the trade. This improper conduct was sternly rebuked by Lord Kenyon, who said "that masters should be cautious of conducting themselves in that way, as they were as liable for a conspiracy as the journeymen. There was a case where a master, from shewing too great indulgence to his men, had become himself the object of a prosecution." Modern legislation, it is perhaps hardly necessary to mention, has greatly altered the law in regard to such combinations, which are no longer, when properly conducted, treated as criminal; the civil position is not so clear.

The fountain head of the law as to civil proceedings for breaches of contract between persons placed in the position of employer and employed is to be found in *Lumley v. Gye*, which will be now dealt with.

1. *Lumley v. Gye* (1853), 2 E. & B. 216.

Plaintiff was lessee of a theatre. Johanna Wagner, a dramatic artiste, agreed with him to sing at his theatre for a period of three months. She also agreed (*inter alia*) not to sing or use her talents elsewhere during the term without plaintiff's consent in writing. In breach of this contract she refused to sing at plaintiff's theatre and sang at a rival theatre of which defendant was lessee. An injunction was granted to restrain this breach of contract (*Lumley v. Wagner*, 1 DeG. M. & G. 604).

The present action was for "maliciously" enticing and procuring Miss Wagner to break her contract.

A demurrer was filed.

It was argued that plaintiff's only remedy was an action for breach of contract against Wagner, and that Wagner being a dramatic artiste was not in any sense a servant so as to make the law as to the relationship of master and servant applicable to her case.

This contention was overruled (Coleridge, J., dissenting).

It was held to be "clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law."

It was further held that this remedy was not confined to "services or engagements under contracts for services of any particular description."

It will be observed in reading this case that both in the pleadings and in the judgments, malice is treated as being a material element.

The far-reaching effect of this decision has been pointed out by Lord Lindley (Quinn v. Leatham, [1901] A. C. p. 535):—"The principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

2. *Bowen v. Hall* (1881), 6 Q. B. D. 333.

Action by a brickmaker against rival brickmakers for wrongfully enticing away and keeping one Pearson, a skilled workman, who had entered into an agreement to make white-glazed bricks for the plaintiff, and had also agreed not to engage himself to anyone else for a term of five years; the secret of making these bricks was known to Pearson and only a few others.

The majority of the Court held that the contract was one for personal services, though not one which established strictly for all purposes the relation of master and servant between the plaintiff and Pearson.

Brett, L.J., said: "Merely to persuade a person to break his contract may not be wrongful in law and in fact. But if the persuasion be used for the indirect purpose of injuring

the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think it cannot be doubted that a malicious act such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful."

The stress placed upon motive in this case must be noticed; upon the malicious motive depends the liability, whether the act done be lawful or unlawful.

Lord Coleridge, C.J., who dissented (as his father Coleridge, J., had done in *Lumley v. Gye*), said as to this latter proposition: "I do not know, except in the case of *Lumley v. Gye*, that it has ever been held that the same person for doing the same thing under the same circumstances, with the same result, is actionable or not actionable according to whether his inward motive was selfish or unselfish for what he did."

This case established "that in actions for inducing a breach of contract between the plaintiff and a third person, the law will combine a damage which is not in itself actionable to a motive which is not in itself actionable, and form a cause of action out of the combination."

Malice can render a lawful act unlawful.

3. *Mogul Steamship Company v. McGregor*, 23 Q. B. D. 598, [1892] A. C. 25, comes next in order of time.

An action against an association composed of certain steamship lines which had combined for the purpose of securing for themselves the monopoly of the China trade. Here there was, as Judge O. W. Holmes has said, "a combination of the most flagrant and dominant kind, and a combination which was essential to the success of the undertaking."

The plaintiffs were refused admission to the association, and by means of stringent pressure put upon shippers, agents, and others by the association, were prevented from trading, suffered heavy loss, and were practically ruined. But the Courts held that, inasmuch as the acts done by the defendants were done in the course of trade competition, in order

to advance their own trade, and as upon the facts it was "impossible to suggest any malicious intention to injure rival traders, except in the sense that as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself," no legal right had been interfered with and no legal injury inflicted, and therefore the action could not succeed.

"If," it was said by Lord Watson, "the respondents' combination had been formed not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for consideration."

Lord Hannen said that it appeared to be "clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves."

As between *Bowen v. Hall* and the *Mogul* case, this anomaly has been pointed out. "In the former case the selfish motive of the defendant, that is, his desire for personal gain, is the essential element which makes his act illegal; in this case this same selfish element, the desire to advance their own trade at the expense of the plaintiffs, is considered the very element which gives just cause and excuse for the injury inflicted."

But the explanation of this probably is that in *Bowen v. Hall* the act brought about was the procuring of a breach of contract, "the intentional procurement of a violation of individual rights," an element which was held to be non-existent in the *Mogul* case.

4. *Temperton v. Russell*, [1893] 1 Q. B. 715.

Between this case and *Lumley v. Gye* "there is a chasm." (Per Lord Herschel).

The plaintiff, a master mason in Hull, brought this action against trade union officials for (1) unlawfully and maliciously procuring certain persons who had entered into contracts with the plaintiff to break such contracts, and (2) for maliciously conspiring to induce certain persons not to enter

into contracts with the plaintiff, by reason whereof the plaintiff sustained damage.

It was held that the action would lie for both causes, if damage ensues, and that this rule is not confined to cases of master and servant or cases of personal service.

Maliciously inducing a person not to enter into a contract is thus held to be a ground of action; perhaps if coupled with the element of combination.

Here again Lord Esher, in dealing with the distinction suggested between inducing a breach of contract and inducing persons not to enter into contracts, insists upon the importance of motive: "I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious."

This is once more emphatically laid down by the same learned Judge in *Flood v. Jackson*, [1895] 2 Q. B. 21, where he says: "An act which may be lawfully done to the injury of another if done without malice, is made unlawful if done with malice, and gives a right of action if injury ensues."

This is practically the Scotch doctrine of "*cemulatio vicino nocendi*," which came up for consideration in the same year (1895) in the House of Lords, in a case which should be noticed before taking up the appeal from *Flood v. Jackson* (*Allen v. Flood*, post).

5. *Corporation of Bradford v. Pickles*, [1895] A. C. 587.

An action to restrain the defendant, a landowner, from sinking shafts and driving levels through his own land, for the professed purpose of draining the strata with a view to working the minerals therein.

The effect was to discolour the water in springs fed by waters percolating underground, and the operations if persevered in would have seriously diminished the supply of water to these springs upon which the city of Bradford largely depended for its water supply.

It was contended that the real object of the defendant was to force the corporation to buy him out at a price satisfactory to himself.

It was held by the House of Lords that even if this were true, even though the motive of the defendant was not to benefit himself, but to injure his neighbour, the plaintiff could not be interfered with; that his right was the same whatever his motive might be, whether bona fide to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out.

Lord Halsbury, L.C., said: "This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it."

Lord Watson said: "No use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious."

Lord Macnaghten said "It is the act, not the motive for the act, that must be regarded. If the act, apart from the motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."

The act complained of in this case was the user of the defendant's own property and was committed thereon; it did not disturb the plaintiffs in any right of theirs.

#### 6. Allen v. Flood, [1898] A. C. 1.

This case arose out of difficulties between the Shipwrights' Union and the Boilermakers' Union; the latter union worked only in iron, and considered the former one as trespassing on its trade, inasmuch as it worked both in iron and wood.

Flood and Taylor were shipwrights, and, while working for former employers, had worked in iron as well as wood. They secured employment from the Glengall Iron Company, and worked at a vessel being built by that company; they were employed by the day. Many among their fellow workmen were members of the Boilermakers' Union, and these, on discovering what Flood and Allen had previously done, were incensed at their introduction, and resolved to get rid of them.

One Allen, a "walking delegate" of the Boilermakers' Union, was sent for by the dissatisfied workmen, who told him they were going to strike. He saw the manager of the company, and told him that if these two men were not discharged all of the iron-men would leave off work or be called out; it is not quite clear which he said.

As a result of this communication from Allen, Flood and Taylor were discharged.

This action was then brought against Allen and the officials of the union. As to the latter it was dismissed at the trial, the evidence failing to implicate them. In reply to questions put, the jury found that Allen maliciously induced the company to discharge Flood and Taylor from their employment, and maliciously induced the company not to employ them. Judgment was entered for the plaintiffs, and this decision was affirmed by the Court of Appeal.

The majority of the House of Lords held that this decision must be reversed, that the appellant, Allen, had violated no legal right of the respondents, had done no unlawful act, and used no unlawful means, in procuring their dismissal, and that his conduct was therefore not actionable, however malicious or bad his motive might be.

"The law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong." (Lord Watson, p. 92.)

Allen v. Flood was for a long time considered by writers and Judges to be an authority of first-rate importance in relation to the law of Torts, but by the process of "distinguishing" employed in *Quinn v. Leatham*, [1901] A. C. 495, it has been emasculated, and now represents very little, the only principle which, in the light of the latter case, can be extracted from it being already contained in *Corporation of Bradford v. Pickles* (*supra*).

"The real point decided in this case was that a servant had no right of action against a person who had merely informed the plaintiff's employers that most of their workmen would leave them if they did not discharge the plaintiff, although in giving this information the defendant had acted

maliciously and with intent to injure the plaintiff." (Smith's Master and Servant, 1902, p. 127.)

Professor Dicey summarizes the case thus: "An act which does not in itself amount to a legal injury cannot be actionable merely because it is done with a bad motive. This conclusion is all that *Allen v. Flood* does establish. It harmonizes perfectly with *Bradford v. Pickles*, and negatives the legal validity of judicial dicta with regard to the effect of malice to be found in *Bowen v. Hall* and *Temperton v. Russell*." (18 L. Q. Rev. 1.)

These conclusions are amply borne out, and indeed necessitated, by the judgments in *Quinn v. Leatham*, where the law Lords treat the case of *Allen v. Flood* as an authority only for the proposition that a person who merely communicates facts, without using any threats, is acting lawfully, whatever his motives.

Lord Halsbury, L.C., says: "The hypothesis of fact upon which *Allen v. Flood* was decided by a majority of this House was that the defendant there neither uttered nor carried into effect any threat at all; he simply warned the plaintiffs' employers of what the men themselves, without his persuasion or influence, had determined to do" (p. 506).

Lord Macnaghten said: "In my opinion *Allen v. Flood* laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this House were contrary to principle and unsupported by authority" (p. 508).

Lord Lindley says: "In the opinion of the majority of your Lordships' House, all that *Allen* did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs" (p. 532).

"The head-note might well have run in words used by Parke, B., 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent'" (per Lord Macnaghten, *ib.* p. 508-509.).

It is obvious, however, from reading the elaborate and learned judgments of the many Lords and Judges who took part in that case (*Allen v. Flood*) that in their opinion the decision involved doctrines in the law of Torts much more im-



portant and comprehensive than the neat point which it must now be treated as deciding.

But these judgments must now be regarded as purely academic in their character, of value only to the student of the relation of malice to the law of Torts, if not to be laid aside in "the law's lumber-room." This is made clear by Lord Halsbury's statement: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Lord Lindley says: "This decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of very different character from the first. The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new nor laid down for the first time in *Allen v. Flood*: it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way, cannot of itself be actionable, whatever the motive or intention of the informant may have been" (p. 533-534).

In their judgment in *Allen v. Flood* their lordships accepted the case of a combination formed with the express and

malicious intention of inflicting injury upon another. This point arose for determination in *Quinn v. Leatham*.

7. *Quinn v. Leatham*, [1901] A. C. 495.

*Leatham*, a butcher, employed workmen, some of whom were not members of the local union. *Quinn*, the treasurer of the union, together with other representatives of the union, desiring to punish these non-unionists, demanded that *Leatham* should discharge them. *Leatham* was quite willing that these men should join the union, and, being present by invitation at a meeting thereof, offered to pay all fines, debts, and demands against his men, and asked to have them admitted to the union. This was refused. On *Leatham's* declining to cease to employ these men, *Quinn* and other members of the union by various means induced several of his customers and also several of his workmen, to leave him, and thereby ruined his business.

The most damaging measure taken by the union was to coerce one of his principal customers, a butcher named *Munce*, who had taken £30 worth weekly of meat from the plaintiff, for twenty years, but had no contract with him, to cease dealing with him by threats that they would call out *Munce's* union employees.

*Leatham* brought an action, in Ireland, against *Quinn* and other leading officials of the union, and recovered damages. The verdict was sustained in the Irish Courts, and finally by the House of Lords, which held that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or to cease to continue in his employment or to deal with him is, if it results in damage to him, actionable.

The personnel of the Court in this case was different from that in *Allen v. Flood*. Those great men, Lord Herschel and Lord Watson, who formed part of the majority in *Allen v. Flood*, had died, and their places had been taken by Judges who sympathized with the views of the Lord Chancellor and the minority in *Allen v. Flood*. The effect of this appears in the (almost) *reductio ad absurdum* of *Allen v. Flood* produced by the judgments in *Quinn v. Leatham*. The latter

was no doubt a case of flagrant wrongdoing in which one's sympathies are entirely with the plaintiff. But full justice might easily have been done to him without it being necessary to minimize *Allen v. Flood*.

It must be admitted that while some points are clearly settled by *Quinn v. Leatham*, yet as a whole it leaves the present position as to trades unions in an unsettled and unsatisfactory state; the judgments are inconsistent with each other, and are an evident attempt to evade the force of *Allen v. Flood*.

As compared with the *Mogul* case, the first impulse is to suggest,

“That in the captain's but a choleric word  
Which in the soldier is flat blasphemy.”

What points are settled?

(1) The general proposition that no action will lie unless a wrong has been committed has been emphatically affirmed.

(2) To procure a breach of contract is to commit a wrong.

“A violation of a legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference.” (Lord Macnaghten, p. 510.)

(3) *Lumley v. Gye* was rightly decided.

The authority of this case had been supposed to have been shaken by *Allen v. Flood*, but it is clearly re-affirmed in *Quinn v. Leatham*.

“If the above reasoning is correct, *Lumley v. Gye* was rightly decided, as I am of opinion it clearly was.” (Lord Lindley, p. 535.)

“Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action.” (Lord Macnaghten, p. 510.)

(4) *Temperton v. Russell*, which was also regarded as shaken by *Allen v. Flood*, is now declared to be good law.

"The decision in *Temperton v. Russell* was not overruled in *Allen v. Flood*, nor is its authority, in my opinion, shaken in the least by the decision in *Allen v. Flood*. Disembarrassed of the expressions which Lord Esher unfortunately used, the judgment in *Temperton v. Russell* seems to me to stand on surer ground." (Lord Macnaghten, p. 509.)

"In *Temperton v. Russell* there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right." (Lord Lindley, p. 535.)

(5) The *Mogul* case, in which just as oppressive circumstances existed as in *Quinn v. Leatham*, is re-affirmed, and distinguished from the latter case, on the ground that in the former case the acts complained of were done in the course of trade competition, by persons merely exercising their own rights, and infringing no rights of other people, whereas the acts complained of in *Quinn v. Leatham* were "acts of wanton aggression, the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade." (Lord Brampton, p. 528.)

But in truth there is little difference in principle between the *Mogul* case and *Quinn v. Leatham*, and similar cases.

"In England" (says Mr. Justice O. W. Holmes) "it is lawful for merchants to combine to offer unprofitably low rates and a rebate to shippers for the purpose of preventing the plaintiff from becoming a competitor, as he has a right to do, and also to impose a forfeiture of the rebate, and to threaten agents with dismissal in case of dealing with him. But it seems to be unlawful for the officer of a trade union to order the members not to work for a man if he supplies goods to the plaintiff for the purpose of forcing the plaintiff to abstain from doing what he has a right to do."

It cannot be denied that the economic tendencies of Judges are, as was pointed out by Lord Esher, M.R., in regard to cases under the Employers' Liability Act, 1880,

(*Walsh v. Whiteley*, 21 Q. B. D. p. 374) largely responsible for the differing judgments.

"There have always been two schools of thought in relation to cases of this kind," and according as the one or other school has the predominance in the Court dealing with the matter in question, the decision will be in accord with the views of the majority. It is not therefore necessary to take the position that Mr. Haldane is reported to have taken recently in the House of Commons when "he compared the alleged position of trade unionists in recent cases with that of the combination of ship-owners in the *Mogul* case, and asked, in effect, whether there be one law for the capitalist and another for the working man." (19 L. Q. Rev. 37.)

But a close study of the cases vindicates what Mr. Haldane says: "It seems as if the distinction lay, not in legal principle, but in the different complexion which the facts wear for the persons regarding them. No one who studies such cases as *Allen v. Flood* and *Quinn v. Leatham*, and compares the divergencies of view which they disclose with the opinions expressed in the earlier cases of *Temperton v. Russell* and the *Mogul Steamship Company*, can say with truth that the law is easy to understand, or even that these propositions can be reconciled. The Judges in *Quinn v. Leatham* evidently struggled against adopting the logical conclusions from previous judgments. These decisions disclose divergencies of views amongst distinguished men which make it hopeless for anyone to try to say with accuracy or certainty what the law is."

How far is the question of combination or conspiracy affected by *Quinn v. Leatham*?

This element did not exist in *Lumley v. Gye*, *Bowen v. Hall*, or *Allen v. Flood*, and was expressly excepted in the judgments in the latter case.

In deciding *Quinn v. Leatham* the Judges in the Irish Courts laid hold of the elements of coercion and combination as differentiating it from *Allen v. Flood*, which they felt would otherwise control the decision.

Although in the House of Lords the lords did not all rest the case on the element of combination, Lord Lindley in particular pointing out that if it had been possible for one man to do what the defendants did, "he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action" (p. 537), yet on the whole, the fact of the combination is treated as an important factor in all the judgments.

"In this case it cannot be denied that if the verdict stands there were conspiracy, threats, and threats carried into execution." (Lord Halsbury, L.C., p. 507.) (See also pp. 511, 512, 515, 525, 530, 538.)

The "positive conclusions" drawn by Professor Dicey from the cases are as follows:—

"(a) A combination of X., Y., and Z., to damage A. in his trade and by means of intimidation or coercion, induce his customers or servants against their will either to break their contracts with him, or not to continue in his employment, is, if it results in damage to A., actionable; or, A. has a right to carry on his own business, as long as he does not break the law, in the way he himself prefers.

"Hence it is the legal duty of X. and Y. not to use intimidation or coercion towards A. or his customers, with a view to preventing A. from carrying on his business in the way he chooses.

"This appears to be the central position established by the judgments of the House of Lords in *Quinn v. Leatham*."

He draws this further "subordinate conclusion:—

"(c) Perhaps, that conduct which if pursued by X. alone, i.e., without acting in concert with others, is not actionable, may, nevertheless, if it be the result of concert or agreement between X. and Y., give a right of action to any person, A., who is damnified thereby." (18 L. Q. Rev. p. 1.)

There may possibly, as a result from *Quinn v. Leatham*, be an actionable conspiracy to do acts not in themselves actionable, and *Kearney v. Lloyd*, 26 L. R. Ir. 268, and *Huttley v. Simmons*, [1898] 1 Q. B. 181, may perhaps now be considered as overruled.

On the other hand, in *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 1 K. B. at p. 136, Mr. Justice Bigham deals with the subject of conspiracy as follows: "An actionable conspiracy exists when a number of men combine either to do an unlawful act or to do a lawful act by unlawful means. There is good authority for saying that a combination entered into for the mere purpose of doing a lawful act cannot constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff and must cause him damage."

One powerful engine by which trade unions try to make strikes successful is "boycotting" or "picketing." By the Criminal Code (sec. 523) these and other acts of intimidation are made criminal offences, but it has been found more satisfactory to invoke the "strong arm of equity" and to put an end to them by injunction. The leading case is *Lyons v. Wilkins* (No. 1), [1896] 1 Ch. 811, and (No. 2), [1899] 1 Ch. 255, a case of the greatest importance to trade unions. An injunction was granted restraining the defendants, who were officers of a trade union, "from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them."

The Court expressed the opinion that the acts of watching and besetting proved in that case, although it was admitted that the pickets used no violence or intimidation or threats, were acts in themselves unlawful at common law, as constituting a nuisance of an aggravated character.

It was pointed out by Chitty, L.J., that the section in the English statute (Cr. Code 523), although it probably arose out of trade disputes, is not confined to trade disputes or to disputes between masters and men, but applies equally to all His Majesty's subjects of every class, and would embrace the case of besetting a man's house with a view to compel him not to receive guests or visitors.

"Such conduct," says Lindley, M.R., "seriously interferes with the ordinary comfort of human existence and or-

dinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law."

This decision has been followed in our Courts, the most recent illustration being that of *Krug Furniture Co. v. Berlin Union, etc.*, 2 O. W. R. 282, 5 O. L. R. 463, where the defendants were restrained "from watching or besetting the railway station at Berlin, or the works of the plaintiffs, or the approaches thereto, or the places of abode of the workmen employed by the plaintiffs, for the purpose of persuading or otherwise preventing persons who have or may enter into contracts with plaintiffs to commit a breach of such contracts, or persuading or preventing such persons from entering into plaintiffs' employment."

In this case, because of some disagreement between plaintiffs and their "finishers," the woodworkers left the plaintiffs' employment and began a "sympathetic strike." Their right to do this was not questioned, but their "sympathy" was far from being passive in its character, and was manifested by conduct which was "often of an offensive and highly reprehensible character." The learned Judge said: "So long as the workmen resorted to lawful means only to accomplish a lawful object, they were within their right; but any unlawful object, or unlawful means to obtain a lawful object, should be met with prompt prevention and punishment."

A remarkable development of the principles of *Lyons v. Wilkins* is to be found in two recent applications for injunctions to restrain newspapers from publishing notices to workmen, warning them that a strike was in progress. In the first of these, *Rudd v. The Mail* (1st May, 1903) an *ex parte* injunction was granted restraining the defendants from inserting the following notice: "Harness and collar makers keep away from Toronto and Toronto Junction. Trouble on." This injunction was afterwards continued, the defendants not objecting to it.

In the case of *Dixon v. The Globe* (15th June, 1903) an *ex parte* injunction was granted restraining the insertion of the following notice: "Carriage and waggon makers. Strike on in Toronto." Judgment has not yet been given upon the



motion to continue this injunction, which was strenuously resisted.

The question in both these cases being thus sub judice, comment upon them at present would be improper.

The section of the Criminal Code seems more stringent than the Conspiracy Act which was in question in *Lyons v. Wilkins*. In this latter Act there is a proviso that attending at or approaching a house "in order merely to obtain or communicate information, shall not be deemed a watching or besetting" within the meaning of the section; this proviso is not contained in the Code, which is thus less favourable to those who watch or beset.

But the effect of the decision is that watching and besetting is illegal unless it is merely for the purpose of obtaining and communicating information as distinguished from persuasion, however peaceable.

But there is in practice no information given for academic reasons, or with any motive except that of persuasion. This decision practically nullifies this mitigating proviso.

Referring to *Lyons v. Wilkins*, Mr. Haldane says: "It is almost impossible in view of this decision to conduct a strike lawfully. To hold what the Court of Appeal held not only in the case of *Lyons v. Wilkins*, decided in 1899, but in the earlier case in [1896] 1 Ch. 811, is to make the protection which the section affords to the workman a mere trap. It may be argued that a strike is a wicked thing, and ought to be illegal in every shape and form. It may with equal force be said that the combination of great shipowners against their weaker rivals to the extent of ruining them was likewise a wicked thing, yet the House of Lords has solemnly declared that this latter course of conduct is not wicked, but is natural and legal on the part of persons carrying on business. One asks why the workman should be in a different position from the capitalists, for it is difficult to distinguish the cases."

It will be remembered that Lord Macnaghten (*Quinn v. Leatham*, p. 510) said: "It is a violation of legal rights to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

What is a sufficient justification?

Three interesting cases relating to trades unions will help to answer this question.

(1) *Giblan v. National Amalgamated Labourers Union of Great Britain* (1902), 18 T. L. R. 500. (See 19 L. Q. Rev. p. 193).

The plaintiff, a former trade union official, who had been expelled from the union for alleged misconduct, sued the Labourers' Union, the general secretary, and the local secretary, because on four separate occasions he was dismissed from employment through the influence of the union, who approached his employers and threatened a strike unless he were turned away. The jury found that this was intended as a punishment to Giblan for his misconduct while a union official.

It was held by Walton, J., that the plaintiff was entitled to succeed as against the officials individually, on the ground that the action taken was punitive or vindictive. He considered that, although under the *Mogul* case conspiracy furnishes no ground of action if the object is to protect or advance the interests of members of the union, even though a necessary consequence would be to injure the plaintiff, yet it does furnish a ground of action if the object is directly and primarily to injure the plaintiff.

The union, however, was held not to be responsible inasmuch as the secretary in what he did was acting beyond his powers.

(Compare with the above case *Bulcock v. St. Anne's, etc.*, 19 T. L. R. 27).

(2) *Read v. Friendly Society*, [1902] 2 K. B. 88, 732.

The plaintiff, a workman, entered into a contract by which he was apprenticed to his employers to learn the business of stone and marble masons. The defendants, a friendly society of stonemasons, protested to the employers against the engagement of the plaintiff as an apprentice on the ground that it was a breach of one of the rules of the society which the employers had agreed to and signed, and they gave notice that if the engagement was continued they would call out the

workmen who were working for the employers, and who were all members of the society. In consequence of this threat the employers refused to continue to teach the plaintiff under the terms of the deed of apprenticeship. This action was against the defendants for wrongfully and maliciously procuring a breach of contract between the employers and the plaintiff.

Held, that the plaintiff had a good cause of action.

“Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action; and a strong belief on the part of the persuader that he is acting in his own interests does not seem to me to improve his position in any respect. Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiff's expense by coercion. The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might, in given circumstances, be ‘just cause,’ or, in other words, suffice to negative malice. It is very desirable to guard against the notion that if the act done be illegal ‘just cause’ may still be averred to purge the wrong.” (Collins, M.R., pp. 738, 739).

(3) Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 1 K. B. 118.

Action against the federation and its executive officers to recover damages for having maliciously and fraudulently procured certain workmen of the plaintiffs to break their contracts of service.

The executive council of the federation were authorized by the members to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally in order to arrest the downward price of coal.

The council subsequently declared a general holiday, without notice to the masters, when all the miners left off work for the day.

Mr. Justice Bigham found that the defendants acted honestly and without any malice, and, in ordering the stop days, did no more than what they conceived to be in the best interests of the men, and with lawful justification and excuse inasmuch as they had been solicited by the men to advise and guide them on the point; it was therefore their duty and right to give the advice, and to do what might be necessary to secure that the advice should be followed.

He further found that the defendants acted without any intention, malicious or otherwise, of injuring the plaintiffs.

He therefore dismissed the action, holding it not to be maintainable.

The learned Judge seems to re-introduce actual malice as an essential element in an action for procuring a breach of contract, that is to say, a real intention to harm the plaintiff. He refers to *Lumley v. Gye* as a case in point, saying, "the allegation was that the defendant 'maliciously procured' the servant to break her contract, and the judgment rests on the malice so imputed to the defendant," therein, it will be seen, differing from *Lord Macnaghten (supra)*. He further says: "To support an action for procuring a breach of contract it is essential to prove actual malice." "In order to get a cause of action there must be an interference without sufficient justification; in other words, if from all the circumstances it appears that the interference was justified, the cause of action does not exist."

The following passage from the judgment is of importance as shewing the point of view of the learned Judge, and also as indicating the distinction between this case and *Quinn v. Leatham*: "Stopping, no doubt, involved a breach of the men's contract with their masters. But, if a man asks another for advice as to whether or not it is wise to break a contract, is not the person asked entitled (so long as he acts honestly) to give the advice, and if the advice is followed, do not the circumstances afford the man who gave it a sufficient

excuse within the meaning of the rule? Solicitors, parents, and friends are over and over again consulted as to whether it is better to continue to perform a disastrous contract or to break it and to submit to a claim for damages. Do they by giving the advice, and so procuring the breach, make themselves liable in tort? Or does not the fact that they were asked for advice and gave it honestly afford a sufficient excuse for what they did? A man may persuade himself to break his contract, and the only consequence is that he renders himself liable in damages for the breach. He certainly does not thereby create a further action against himself in tort. Then why should his friend who advises him, and perhaps prevails upon him, to do the same thing, incur the consequences of such a cause of action?" (p. 135). The argument is not, it is submitted, conclusive, but I have quoted at length from it because it seems to shew that the current of judicial opinion (if the judgment is not appealed from successfully) is trending towards relaxing the rule that to procure an illegal act by whatever means constitutes an actionable wrong. "A breach of contract may not be a tort, but it is none the less an illegal act, and it is difficult to see why the procuring of it should not be actionable."

It also shews a tendency to lay stress once more upon motive in such cases. As has been pointed out, the present case is most valuable to trade unions, for it promises them practical immunity in giving advice to their members so long as they can persuade the Court of the honesty of their motives. This in the general case will present little difficulty, for, to do the unions justice, their advice generally proceeds from an honest, though indeed often mistaken, conviction that what they are advising is in the best interests of the workmen.

It is obvious that, under the guise of "advice," which all parties concerned well know cannot be disregarded with impunity, the unions have main de fer, gant de velours, with which to "induce" obedience to their behests.

The question as to what is a "sufficient justification," asked on an earlier page, may now, to a limited extent, be answered.

(1) A disciplinary or vindictive motive is not (Giblan's case).

(2) The promotion of one's own interest, or the desire to injure another, does not justify pressure by which a breach of contract is procured (Read's case).

But the wrongfulness of the act is taken away if there is any lawful justification for what has been done.

(3) "Disinterested advice is privileged." One who, bona fide, without desire to injure, and without any self interest, merely advises a breach of contract, is not liable to an action by the injured party (Glamorgan case).

"Interested inducement to commit a breach of contract is one thing; fair advice, which leads another to break a contract, is another and a quite different thing."

I must confess that a review of all these cases, and a careful perusal of the many judgments rendered in them, compels me to agree with Mr. Haldane, that the law as to trade union questions is "in a muddled condition," and to quote with approval the opinion of a careful student of this subject: "The general principles of this branch of the law are not made perceptibly clearer by the cases quoted above. In what circumstances it is wrong to procure a breach of contract, what constitutes 'illegal coercion,' what are the elements of legal malice, and in what cases honest motive may be pleaded in justification—are questions still unanswered. It appears as if firm ground will never be reached until every conceivable combination of circumstances has arisen and has been made the subject of separate decision. One thing alone is clear—that none but the most cheerful optimist will agree with the learned Chief Baron when in the Tallow case he says that it is now 'almost impossible for even a tyro at the Bar to doubt what the law is in such cases.'"

N. W. HOYLES.

Toronto.

## MR. JUSTICE DARLING.

In 1879 there was published the third edition of "Scintillæ Juris," by Charles J. Darling, of the Inner Temple, and it has occurred to the writer that the author of the bright and penetrating sayings recorded in that little book would probably carry his characteristics into his judgments, and that in them would be found something of literature and something of unique individuality. I have confined myself to decisions given by him within the past two years, from which some extracts may be of more than technically legal interest as illustrating a mind and a man not often to be met with on the pages of our reports, which are usually associated with "dry law."

Let me premise, however, by a few quotations from the book above referred to, which often scintillates, sometimes philosophises.

"It is in getting a verdict as in getting everything else: you will obtain it the more easily if you know of no reason why you should not."

"All laws, often the most democratic, are designed to prevent equality—which is chaos."

"One of two tenants in common of one thousand acres owns every part of that thousand, but has not nearly so much pleasure from his land as he has who is separately possessed of five hundred, for, although he can say 'it is my own,' he cannot proceed, 'and nobody else's.'"

"It is expedient to understand the decided cases: but this cannot be done without examining closely the personal characteristics of those who decide them. Anyone who will, may satisfy himself by taking down any volume of reports, old or new, that any given Judge will run in a particular direction if he fairly can." Was this prophetic of himself?

"A chairman of Quarter Sessions will hardly ever reserve a question of law: but he will generally leave it to the jury."

"That a prisoner's wife may not be called, even by himself, is a beneficent provision designed by his enemies to save him from his friends. . . . As Izaak Walton, while impaling a frog, would use him as though he loved him, so do our Courts manipulate a criminal."

"The plaintiff or defendant should be examined with more deference and ceremony than any other witness in the case. They always feel that they are the chief actors, and are somewhat proud of having so behaved themselves as to have brought together a large number of people to listen to their mutual complaints and recriminations, and particularly of having afforded their counsel an opportunity of display."

"A nervous witness generally means to speak truly: and seldom does so. A religious witness takes credit for so many virtues that he allows himself much license in dealing with truth."

"It passes the comprehension of women why they should be stopped just when they are about to inform the Court of the most important matter of all, viz., what a man's wife thinks of him. Women are invariably angry in the witness box, for the rules of evidence happen to be peculiarly repressive to feminine conversation."

"If a man stay away from his wife for seven years, the law presumes the separation to have killed him: yet, according to our daily experience, it might well prolong his life."

"Perhaps the presumption most consonant with common sense is that one by which a man who has possessed land for twenty years is supposed to have a good title to it, because, if he had not, some one would have taken it from him. Such a presumption rests on the fact of human rapacity: and is, therefore, well nigh irrebuttable."

"It is a common practice to conclude speeches with a burst of indignation: but such a feeling concerning the wrongs of others is the shortest lived of the passions. I would rather touch last upon prejudice, for it endures like bronze, and is easily written on with the acid of epigram."

"The books contain the maxim 'Via trita, via tuta.' I do not know that this has yet been alleged as a reason for not



repairing a highway: but it would make as good a defence as many I have heard."

Now, let us make the transition of over thirty years from the young barrister of the Inner Temple to the mature Judge, and I think the impression will be universal as we advance in our mental acquaintance that we have upon the Bench a man of strength and character, and one who is full both of vitality and of common sense, one who must make it interesting at times both for counsel, clients, and for his learned brethren, one who can quote and who can originate, one whose judgments, if not characterised by profundity, have, at least, the merits of incisive brevity and penetration.

In [1901] 1 K. B. at p. 363, we read:—

"The doctrine relating to consumable things does not apply to farming stock. It seems to me that even grain, roots, and other similar things which are in fact consumed by being used as food for cattle, or by being sown in the ground, are not things *quæ ipso usu consumuntur* within the meaning of that doctrine, for they are consumed with the object of being reproduced." What other English Judge has struck the true keynote of modern agriculture, viz., that it is becoming a manufacturing industry.

At p. 724 we find the following:—

"The reason why the pauper of the Tipton Case lost his birth settlement was because he was born in a parish which had passed away. This pauper was born in West Ham, and West Ham has not passed away. West Ham has been amalgamated. . . . It is quite enough to say that the Tipton Case settled that if some portion was taken away from a parish that parish was destroyed: but no decision yet says that adding something to a parish equally destroys it."

In [1901] 2 K. B. p. 41, we read *inter alia*:—

"The bankrupt adopted the device of filing his petition in bankruptcy as part of a plan or system by which he was enabled to become what I may call a professional bankrupt. I think that this petition was nothing short of an obvious abuse of the process of the Court, and the receiving order must be rescinded."

I make the following extracts from volume 1 of the 1902 reports:—

At p. 165, with reference to the validity of a by-law prohibiting persons from swearing in the carriages of a tramway company, Darling, J., says:

“It is said that the by-law was ultra vires. I think it was not, for these reasons: They had power by statute to prohibit a nuisance in their carriages. This by-law is a reasonable and proper one, although it does not contain any such words as ‘to the annoyance of others,’ because it would be intolerable that persons who have been annoyed by obscene or offensive language in a tram car should be obliged to suffer annoyance again by having to repeat that language before a magistrate.”

Page 177 affords us an opportunity of quoting more in extenso. The question was one of binding over in recognizances to be of good behaviour, a lecturer who had held meetings in Liverpool causing large crowds to assemble, with regard to which Darling, J., furnishes us with the following food for thought:—

“I think it necessary to summarize shortly the facts which were proved before the magistrate. To begin with, we have the appellant’s own description of himself. He calls himself a ‘crusader,’ who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about, and round his neck were hung beads—obviously designed to represent the rosaries used by Roman Catholics. Got up in this way, he admittedly made use of expressions most insulting to the faith of the Roman Catholic population amongst whom he went. There had been disturbances and riots caused by this conduct of his before, and the magistrate had found that the language of the appellant was provocative, and that it was likely to occur again. Large crowds had assembled in the streets, and a serious riot was only prevented by the interference of the police. Now, what was the natural consequence of the appellant’s acts? It was what has happened over and over again, what has given rise to all the cases which were cited to us, and what must be the inevitable consequence if persons, whether Protestants

or Catholics, are to be allowed to outrage one another's religion as the appellant outraged the religion of the Roman Catholics of Liverpool. The kind of person which the evidence here shows the appellant to be I can best describe in the language of Butler. He is one of

“ . . . that stubborn crew  
Of errant saints, whom all men grant  
To be the true Church Militant;

\* \* \* \* \*

A sect, whose chief devotion lies  
In odd perverse antipathies.”

—Hudibras, pt. 1.

In my view, the natural consequence of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case. Counsel for the appellant contended that the natural consequences must be taken to be the legal acts which are a consequence. I do not think so. The natural consequence of such conduct is illegality. I think that the natural consequence of this 'crusader's' eloquence has been to produce illegal acts, and that from his acts and conduct circumstances have arisen which justified the magistrate in binding him over to keep the peace and be of good behaviour.”

At p. 315, in the case of *Pidgeon v. Great Yarmouth Water Works Co.*, the Judge remarks:

“I confess that I should, myself, have doubted whether the use of water for such a thing as a swimming bath was ever contemplated as being a use for domestic purposes. It must be an exceptional sort of domestic life where a private swimming bath is attached to a house.”

At p. 669, Darling, J., remarks that the practice of a wife being sent to a club for a bottle of stout for her husband:

“Is most inexpedient, and I should be very glad to hear that it had been stopped. One can very well see how such a practice may be the means of supplying persons with drink who are not entitled to get it.”

At p. 674 he makes a fine distinction:

“I think that 'to weigh' means to affect to ascertain weight by means of balancing—using what may be properly

called a balance—although the instrument be fraudulently used. Still, one might weigh a thing and sell it, and yet not sell it by its weight. There would be a weighing, and then a selling, otherwise than by weight.”

*Brown v. Brandt* (p. 699) decides that if all the bedrooms of an inn be full the innkeeper is under no obligation at common law to provide a traveller with shelter and accommodation for the night, although the coffee room be unoccupied, and the traveller demands to be allowed to pass the night there.

The following are excerpts from Mr. Justice Darling's judgment:

“The innkeeper is only bound to provide accommodation so long as his house is not full; when it is full he has no duty in that respect. The question then arises, when an innkeeper's house may be properly said to be full. I do not think that the old cases can help one very much, because in olden times people were in the habit of sleeping many in one room, and several in one bed. People who were absolutely unknown to each other would sleep in the same room, as is done in common lodging-houses at the present time. Therefore, if we got a definition of ‘full’ in one of the old cases, I should not be surprised to find that what was called ‘full’ then, we should now call ‘indecent overcrowding.’ It is the habit now of people to occupy separate bedrooms, and, having regard to the ordinary way of living at the present time, I think an inn may be said to be full for the purpose of affording accommodation for the night if all the bedrooms are occupied. There might have been a difficulty here if the plaintiff had said, ‘I will take your sitting-room. I do not want to go to bed. I will sit up all night.’ But that difficulty does not arise on the facts of this case. The County Court Judge has found that the house was full having regard to the modern ways of living. He referred to Chaucer and the Canterbury pilgrims. One need only look at the ‘Sentimental Journey’ to see how people's habits have altered since the time of Laurence Sterne.”

At p. 766, with reference to the jurisdiction of a County Court Judge, he says:

"The Legislature intended in fact that he should do something more than justice in the ordinary acceptation of the term. He is to give justice having regard to the whole circumstances of the case. That, it seems to me, is what the Legislature intended that the County Court Judge should do; and that, I think, is what he has done in this case."

In *Moore v. Keyte* the Guardians had, as required by the Act, appointed a vaccination officer, but had directed him not to prosecute. At p. 777 Darling, J., declared that he had power to prosecute, nevertheless.

"The question is whether guardians who have been compelled by mandamus to appoint an officer to enforce the vaccination laws can obey the law by appointing a vaccination officer, paying his salary, and then ordering him never to prosecute anyone unless he has their sealed order to do so, and then never issuing any sealed order, nor, so far as I can see, ever intending to issue one. To act in such a way as these guardians shewed that they intended to act, is simply to claim a right to reduce the vaccination laws to an absolute nullity. I cannot believe that that is what Parliament intended. It irresistibly occurs to me that this claim is to liken the vaccination laws to a celebrated recipe for dressing a cucumber, viz., to choose it very carefully, peel it, cut it up in slices, add to it certain expensive things, and then throw the whole mixture out of the window." (Times L. R. 1902.)

Canadian butter vendors are not subject to the English laws of label and sale, but Canadian butter must be labelled. The case reported at p. 898 reminds one of the provision of the Railroad Act that required the officials to wear their official badge upon their cap, but did not require them to wear their cap upon their head. In his decision the Judge remarks:

"I think the appellants have sailed very near the wind, and in my view they are saved entirely by the notice that they display in the shop. No one could say that it was the usual way of selling butter to put it in a piece of paper which described it as mixed or blended, and then to wrap upon it an opaque piece of paper which would prevent the purchaser from reading what was on the inside label."

By a reversal of the usual sequence, the next decision of Mr. Justice Darling brought him from butter to milk. At p. 18, volume 2 of the 1902 reports, it appeared that the appellant in *Smithies v. Bridge* had been convicted of having supplied the respondent with an article which was not of the nature, quality, and substance of the article demanded by him. Darling, J., dissented, and says:

"In this case the purchaser asked for new milk, and he got milk just as it came from the cow. It seems to me clear that what he got was new, and the only question therefore is whether it was milk. Unless we can say that the liquid he got was not milk, we cannot uphold this conviction. There is no doubt that it came direct from the cow, and that it appeared to be milk. Of course, I understand by the word 'milk' cow's milk, and I do not think that a person asking for milk would expect to get asses' milk, or that of any other animal. It is said, however, this was not milk because it did not contain a certain proportion of essential fats, but if it was not milk, what was it? . . . Some cows give milk that is richer in fats than others, and people keep particular kinds of cows for this very reason. In my opinion the vendor has supplied the purchaser with something which he was perfectly entitled to call milk. I do not think that I should have taken the trouble to differ in this case if I thought that our decision only applied to milk. . . . I think it would be highly dangerous for us to lay down that a man may be convicted for selling a natural product in the state in which he gets it. For example, a purchaser who had demanded apples and had received them as they were plucked from the tree, might complain that they contained less malic acid or other essential than some analyst might prove to be usually in apples. Poor in quality they might be—but they would still be apples, and as nature produced them. So with this milk."

At p. 96, in *Read v. Friendly Society of Operative Stone Masons*, it was attempted to justify the dismissal of an apprentice who was objected to by the union, on the ground that they were not actuated by improper motives. Darling, J., says:

"I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage."

At p. 164 the learned Judge attended at the obsequies of a decided case in the following expressive language:

"The former case was laboriously distinguished in *Boldero v. London*, but I think that as an authority it must for the future be regarded as apocryphal."

Aiders and abettors of betting find no countenance from Darling, J. At p. 233 he suggests collusion, and thus expresses himself:

"The Legislature were not aiming merely at the person who resorts to a house or place in order to bet, but were endeavouring to put down a far more widespread public vice. This is shewn by their forbidding exhibition of betting lists, to see which it is not necessary to resort to any public house or place. Thinking as I do that *Stoddart v. Argus Printing Co.* was wrongly decided, I must add that I cannot feel any surprise at that result; the case was launched in the most unsatisfactory way; it was a mock battle in which both parties were really interested in the same result being arrived at, and in which the argument for the defendant was short and perfunctory."

In *King v. Dolby* there are some points that may be interesting to our municipal legislators. The Court disallowed the expense of repairs to an omnibus purchased by an urban council for conveying the members about the district when performing their ordinary duties. During the course of the argument both the Lord Chief Justice and Mr. Justice Darling asked: "What need is there for them to go round the district when they employ foremen to do such things? What is the use of the superintendence of a number of unskilled

people?" In the course of his judgment Mr. Justice Darling remarks:

"It would be reasonable and lawful that they should charge for expenses incurred in doing some extraordinary duty which they performed, but a duty could not be at the same time an ordinary and an extraordinary one. If it was their duty to go about doing these things, it would be their ordinary, and not an extraordinary one. What was the difference between an ordinary and an extraordinary duty? An extraordinary duty could not be a settled and definite act which would be done every day. It must be a thing done only rarely and occasionally. For something which they had to do, not every day, but only occasionally, it did not seem to him to be reasonable to maintain an omnibus to go about in. Therefore, it seemed to him that the mere providing and maintaining of this omnibus shewed that they did not regard it as in any way necessary for any extraordinary duties cast upon them, but because they regarded it as a proper convenience for discharging the ordinary duties they had to do. He thought the auditor was perfectly right in disallowing the charge."

This decision will, no doubt, be quoted in the future in committees on the question of cab hire.

It will be noted throughout that this Judge takes note of things extra-judicial. This is illustrated in the case of *Rex v. Governor of Holloway Prison*. Counsel for the defendant argued that the goods removed must be of the value of £10 or upwards, and he submitted there was no evidence upon the decision that the furniture removed was above the value of £10.

Darling, J., said there were two large vans of Dutch furniture.

Counsel said the value would depend upon the size of the vans and the nature of their contents.

Darling, J.—"Suppose the charge was that they had removed an undoubted painting by Titian six feet square, and nothing was said as to its value. Could not the magistrate apply his own knowledge in valuing it?"



His Lordship does not touch the question of dual language, nor does he contrast Eastern with Western civilization, but recognizes in the extradition case of *Rex v. Dix* that there is a difference.

"It seemed to him that in this case the same thing had been made a criminal offence in England and in the United States. Proof of the same facts would prove a crime to have been committed within the law of both countries. It was not in his opinion essential that the offence should be called by the same name in both countries. Mr. Biron had said that both countries used the same language. Roughly, they did; but one could not help knowing that it was not in all cases that exactly the same meaning was given to the same word in the two countries."

Probably an examination of the reports of the earlier years during which he occupied the Bench would reveal a still more interesting series of decisions, which, to say the least, are never commonplace, and which enable us to picture his Lordship with the mind's eye as one who in private life must have both wit and humour, ready repartee, a bright eye and dynamic energy. Personally unknown to most of us, the Bench and Bar of Canada enjoy monthly intercourse with their learned brethren and extend hearts and hands in greeting across the seas.

The story may not be authentic, but the chroniclers have it that Mr. Justice Darling at one time took the duties of the Judge presiding over the Court of Admiralty. He asked the indulgence of the Bar until he could familiarize himself with the practice, and hopefully added:

"And may there be no moaning of the Bar,  
When I put out to sea!"

W. N. PONTON.

Belleville, March, 1903.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Betting.]**—In *Ashley and Smith v. Hawke*, 19 T. L. R. 581, the meaning of the provisions of the Betting Act prohibiting the publication of advertisements of places for illegal betting is considered. Compare the Criminal Code, s. 205, and amendments.

**Bill of Lading.]**—In *Rathbone Brothers and Co. v. David McIver Sons and Co.*, 19 T. L. R. 590, the Court of Appeal refer to the “broad principle which should be applied to the construction of a bill of lading or any other contract (such as a charterparty) relating to the carriage of goods by sea.” It is this: “In the case of carriage of goods by sea the law places certain obligations upon the shipowner which will always bind him, unless there are in the contract clear words which without any ambiguity relieve him from his common law liability.” Giving a strict reading to the bill of lading in question, the Court held the shipowners liable for damage to goods by water which escaped from a broken pipe.

**Building Conditions.]**—*Ilford-Park Estates v. Jacobs*, 19 T. L. R. 574, is a useful case as to building conditions. A condition that not more than one house should be erected on any lot was held to have been broken by the erection of a building containing rooms on two floors, each floor being distinct, and there being a separate outer door for the upper floor. This “erection” was treated as two houses, separated horizontally instead of perpendicularly, and the cases as to “flats” were distinguished.

**Company.]**—In *In re Montgomery-Moore Ship Collision-Doors Syndicate*, 19 T. L. R. 554, the equitable assignee of part of a debt owing by the company to another person was held to be entitled to petition as “creditor” for a winding-up order.

\* Including the cases in No. 29, Vol. 19, week ending July 8th, 1903.

**Contract.]**—*Elliott v. Crutchley*, 19 T. L. R. 549, is a “coronation case” arising out of a contract by the plaintiff to supply meals to passengers on a vessel at the Naval Review. Before the postponement of the review the defendants gave to the plaintiff a cheque on account, and after the postponement had been announced stopped payment of this cheque. It was held that the case must be treated as if no payment had been made, and the doctrine that impossibility of performance without fault on either side excuses both parties and gives a right of action to neither was applied, so that the plaintiff secured nothing.—*Ogdens, Limited v. Nelson*, 19 T. L. R. 565, is a case of an unusual character, arising out of the efforts of rival tobacco manufacturers to attract business. The plaintiffs offered, if traders would agree not to debar themselves from dealing with them (as the rival manufacturers were trying to induce them to do), to divide their profits and a bonus besides among traders doing business with them. The agreement was to continue for four years. It was held that a term that the plaintiffs would carry on business for four years was to be implied, and that the plaintiffs had by selling their business broken this implied term, and were liable in damages to the defendant, whom they were suing for the price of goods sold. The question of the quantum of damages was left open for further discussion.

**Criminal Law.]**—In *Rex v. Meade*, 19 T. L. R. 540, a statute of 1328, 2 Edw. III. c. 3, providing that no person, with certain specified exceptions, shall go armed by night nor by day, was held to be still in force, and the prisoner was under it convicted because he had carried a revolver. The revolver he had fired in the street, and on another count he was convicted of the common law offence of having made himself a public nuisance to the terror of the King’s subjects. And see the more elaborate provisions of the Criminal Code, secs. 102 to 112.

**Evidence.]**—The judgment in *West v. Sackville*, 19 T. L. R. 450, noted ante p. 259, was reversed by the Court of Appeal, 19 T. L. R. 541, on the ground that, as the plaintiff could bring an action under the Legitimacy Declaration Act

to establish his legitimacy and obtain an immediate judicial decision, the Court should not, as a matter of discretion, make an order for the perpetuation of testimony.

**Injunction.]**—In *Lloyds Bank v. Royal British Bank*, 19 T. L. R. 548, an application for an interlocutory injunction to restrain the publication of an alleged trade libel failed, the circular complained of not being, in the opinion of the Court, of such a nature as to make the case one for the exercise of the jurisdiction, which “ought to be exercised on interlocutory motion only in the clearest cases, where if a jury did not find the matter to be libellous the Court could set aside the verdict as unreasonable.” The extraordinary procedure on the part of the defendants complained of by the plaintiffs was the sending of a prospectus and circular by the defendants to shareholders in the plaintiff bank stating that the shareholder addressed was as the holder of so many shares in the plaintiff bank entitled to an allotment of so many shares in the defendant bank, there being no connection between the two banks, and this being merely an effort to dispose of shares.

**Landlord and Tenant.]**—The covenant in question in *Lambourn v. McLellan*, 19 T. L. R. 529, bound the lessee to deliver up at the end of the term the premises together with “all doors, locks, keys, etc., buildings, improvements, fixtures, and things which are now or which at any time during the said term hereby granted shall be fixed, fastened, or belong to the said messuage and premises or any part thereof.” It was held that the covenant did not apply to certain machinery used by the lessee in his business, attached by him to the building by screws for its convenient user. The reminder that the Ontario Short Form of Leases Act contains the converse provision that the lessee may remove his fixtures, is perhaps scarcely necessary.—In *re Warriner, Brayshaw v. Ninnis*, 19 T. L. R. 543, is another case of unexpectedly wide liability being imposed on an unfortunate tenant by the covenant to pay “all rates, taxes, assessments, and impositions whatsoever,” the tenant in this case as in some of those recently noted, ante p. 259, being obliged to pay the cost of

alterations ordered by the sanitary authority.—A covenant by a lessee not to paint or write any inscription, figure, or letter, nor affix, attach, or exhibit any signboard or other notice of trade or business to the exterior walls of the demised premises without the lessor's consent, was held, in *Attorney-General v. The Playhouse, Limited*, 19 T. L. R. 580, to have been broken by attaching by iron brackets to the wall of part of the demised premises, used as a theatre, a metal frame with the name of the theatre thereon.

**Negligence.**]—*Harris v. Perry*, 19 T. L. R. 537, is an interesting case as to the extent of the responsibility of a person who gratuitously furnishes carriage to another. The plaintiff was an inspector of work for an underground railway which was being built by the defendant as contractor. To enable inspection to be made a planked foot-way had been built adjoining a temporary line of railway used for the purpose of removing the earth when excavated. At the invitation of the defendant's timekeeper the defendant got on an electric engine running on this line to go to another point in connection with the inspection, and was badly hurt in a collision between this engine and a loaded truck standing, owing to the negligence of the defendant's servants, as was found, on the line. The defendant, although the plaintiff was held to be at most a mere licensee, was condemned to pay damages, the case coming, as the Master of the Rolls thought, within the class of cases laying down the principle that even for a licensee a trap shall not be set, and he added: "At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty."—*Reynolds v. Thomas Tilling, Limited*, 19 T. L. R. 539, is another negligence case depending upon the effect to be given to a finding of contributory negligence.

It was a street collision case—defendants' omnibus and plaintiff's truck. The jury found in answer to two questions that there was negligence on the part of the driver of the omnibus, and also that there was negligence on the part of the plaintiff which contributed to the accident, and they were unable to agree upon an answer to the third question whether, notwithstanding the negligence of the plaintiff, the driver of the omnibus could have avoided the accident by the use of reasonable care. The plaintiff contended that there should be a new trial, but Mr. Justice Walton held that, even assuming that the third question had been answered in the plaintiff's favour, he would not have been entitled to judgment, for, "if the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything," and so he dismissed the action.—The judgment in *McDowall v. Great Western R. W. Co.*, 18 T. L. R. 340, noted 22 C. L. T. 137, was reversed by the Court of Appeal, 19 T. L. R. 552. This was the case where the brake of a car standing on the defendants' line near a highway was released by some boys who were trespassing on the line, and the car ran down a grade to the highway where the plaintiff was struck and injured. In the Court below the jury's finding, that the danger of interference by trespassers could and should have been guarded against, was treated as conclusive. The Court of Appeal, however, thought there was nothing in the circumstances of the case which would have induced anyone exercising common sense and care to have done anything more than the defendants had done, and that even if there had been negligence the negligence was not the effective cause of the accident.

**Principal and Agent.]**—*Gerahty v. Baines and Co.*, 19 T. L. R. 554, was an action for commission by a canvasser for advertising. The question in issue was the right of the plaintiff to commissions on renewal advertisements issued after the termination (with reasonable notice) of the plaintiff's engagement as canvasser. It was held that he was not so entitled.—*Millar v. Radford*, 19 T. L. R. 575, is also a commission case, in which the Master of the Rolls makes some useful observations. The plaintiffs were employed to find

a purchaser or failing that a tenant; they found a tenant and were paid the rental commission. Subsequently the tenant bought, and they claimed commission in respect of the sale, but failed, the Court holding that the sale had not been brought about by their exertions. "The right of commission," says the Master of the Rolls, "did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to shew that the introduction was *causa sine qua non*. It was necessary to shew that the introduction was an efficient cause in bringing about the letting or the sale." —*Hambro and Son v. Burmand*, 19 T. L. R. 584, is an interesting case dealing with the liability of the principal for the agent's fraud. The agent, who was authorized to take insurance risks for the principals, issued in their names guarantee insurance policies for the benefit of an insolvent company in which he was personally interested. Bigham, J., in an elaborate judgment, points out that "there are only three ways in which a man can be bound by a contract made by one who purports to act as his agent in making it. First, he will be bound if the agent had in fact his authority to make the contract on his behalf; secondly, he will be bound if, though the agent had in fact no such authority, he has held out the agent as having such authority, and has thereby induced the other party to enter into the contract; and, thirdly, he will become bound if, the contract having been entered into in his name but without his authority, he subsequently ratifies the agent's act." The second ground—"holding out"—was held to be untenable, the only holding out being that of the agent, and "an agent to make contracts on behalf of another has no power by his own unauthorized falsehood to create an estoppel against his principal so as in effect to entirely alter the scope of his authority." Ratification was also negatived, for "to constitute a valid ratification of the unauthorized acts of an agent there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts whatever they were." This left only the question of actual authority to be dealt with, and on that the decision was also

against the plaintiffs, for a power to contract for and on behalf of the principals does not authorize a contract really on behalf of and for the benefit of the agent, and the person dealing with the agent must ascertain at his peril the extent of his authority, and whether he is exercising it legitimately.

**Sale of Goods.]**—The judgment in *Preist v. Last*, 19 T. L. R. 278, noted ante p. 158, where the vendor of a hot water bottle was held responsible in damages when the bottle burst, on the principle that reliance by the purchaser on the vendor's skill and judgment threw upon the latter the liability of implied warranty, was affirmed by the Court of Appeal: 19 T. L. R. 527. The case was decided under the Sale of Goods Act, 1893, but the Master of the Rolls remarked that the section in question "seemed merely to express the law as it was before the Act," so that the decision is of general application.

**Solicitor.]**—In *In re Burton*, 19 T. L. R. 581, it was held that, under the English Act, a solicitor who is found guilty of the offence of permitting an unqualified person to use his name must be struck off the roll. While under our Act, R. S. O. 1897 c. 174, s. 28, there is a discretion vested in the Court, the case is important as shewing what the offence is and the serious result of committing it.

**Street Railway.]**—In *City of Montreal v. Montreal Street R. W. Co.*, 19 T. L. R. 568, the Judicial Committee deal with certain clauses of the contract between the plaintiffs and the defendants, the decision being that the railway company were entitled to sweep or throw snow and ice from their tracks on the other parts of the streets, and could use such appliances, including especially electric sweepers, as were best adapted for the purpose.

**Treasure Trove.]**—While not of much importance in this Province from a legal point of view, the case of *Attorney-General v. Trustees of the British Museum*, 19 T. L. R. 555, dealing with the right of the Crown to treasure trove—chiefly Celtic ornaments of gold—will be found of much intrinsic interest.



**Way.]**—The judgment in *Roberts v. James*, 18 T. L. R. 777, noted 22 C. L. T. 365, that user of a right of way during a life tenancy did not give rise to a right by prescription as against the remainderman, was affirmed by the Court of Appeal, 19 T. L. R. 573.—“Once a highway always a highway” is perhaps a sufficient synopsis of *Harvey v. Rural District Council of Truro*, 19 T. L. R. 576, where an attempt to make out title to strips at the side of the travelled portion of a highway failed, the strips having been proved to have been parts of the highway as originally dedicated.

**Will.]**—*Edyvean v. Archer*, 19 T. L. R. 561, is a will case turning upon the meaning to be given to the word “issue” in a gift to children and their issue in a will having, as usual, its own special language. The general remarks of the Judicial Committee as to the danger of adhering too strictly to the general rule that the same word must be given the same meaning wherever it appears in a will may, however, be of some interest.

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## EDITORIAL REVIEW.

**The Lord's Day Act of Ontario.**

The Judicial Committee of the Privy Council (Halsbury, L.C., and Lords Macnaghten, Shand, Davey, Robertson, and Lindley) gave judgment on the 15th July last upon the appeal of the Attorney-General for Ontario and the cross-appeal of the Minister of Justice for the Dominion, the Grand Trunk Railway Company, and others, from the judgment of the Court of Appeal for Ontario (1 O. W. R. 312) upon a special case submitted by the Lieutenant-Governor as to the jurisdiction of the Legislature of Ontario to enact R. S. O. 1897 c. 246, intituled "An Act to Prevent the Profanation of the Lord's Day." The majority of the Court of Appeal answered the main question in the affirmative, Armour, C.J.O., dissenting, but answered some of the other questions as to jurisdiction with regard to particular matters in the negative. The Judicial Committee allowed the cross-appeal and reversed the decision upon the principal question. The judgment of the board was delivered by the Lord Chancellor, who stated that "they were of opinion that the Act of Parliament, treating it as a whole, was beyond the competence of the Ontario Legislature to enact. \* \* \*

The question turned upon a very simple consideration. The reservation of the criminal law for the Dominion was given in language which their Lordships considered to be very plain, ordinary, and intelligible words, to be construed according to their natural signification. Those words seemed to their Lordships to require—and, indeed, admitted of—no wider exposition than the language itself. What was reserved was 'the criminal law except the constitution of courts of criminal jurisdiction, but including procedure in criminal matters.' It was, therefore, as had been once said before in that Court, the criminal law in the widest sense; and it was impossible \* \* \* to doubt that an infraction of the Act which was in operation at the time of Confederation was an offence against the criminal law." No opinion was given upon the

other questions raised. The result is that while the Lord's Day Act, as it existed at the time of Confederation as a statute of Upper Canada, is still in force, the amendments and additions made since Confederation by the Ontario Legislature are swept away, and the amendments proposed to be made, in respect of which the case was first stated, will not be enacted. How the Dominion Parliament will deal with the Act, whether it will amend it, extend it, make it applicable to all the Provinces, or otherwise, remains to be seen. It is to be regretted that Lord Halsbury in giving judgment used language so wide as to be capable of being misunderstood. When his language is read with strict regard to what was before the board, it will be seen that it is not intended to and does not overrule previous decisions as to the power of the Provincial Legislatures, in making enactments as to subjects over which they have jurisdiction, to provide penalties and punishments for offences against those enactments. Possibly the decision—which is at the first view rather startling—will be found to apply to no other statute than the one actually in question, but it is not unlikely that before a clear understanding is arrived at, many questions will be raised as to the validity of other Provincial statutes.

#### **Death of Mr. Justice Armour.**

It is with a deep sense of the loss which the whole country has suffered that we record the death on the 11th July last of John Douglas Armour, a native Canadian, in whose strong character, eminent ability, and high attainments, Canadians took a just pride. He was born in 1830 in the township of Otonabee, in the county of Peterborough, the son of the Reverend Samuel Armour, rector of Cavan. He was educated at Upper Canada College and the University of Toronto, where he took his degree with the classical gold medal in 1850. He was called to the Bar in 1853, and practised in Cobourg. He very soon became known as a lawyer of remarkable skill. He was an excellent pleader in days when pleading meant something, and necessarily had a great familiarity with the principles of the common law. Strange to say he shewed no great ambition as an advocate, and, though he was widely known as a lawyer, he did not always hold even his

own briefs. He became a Queen's Counsel in 1867 and a Bencher of the Law Society in 1871. He was appointed to the Bench in 1877, on the recommendation of Mr. Edward Blake, then Minister of Justice, who had often expressed great admiration for Mr. Armour's talents. He took his seat as a Judge in 1877 in the Queen's Bench, as the successor of Mr. Justice Morrison, who had been promoted to the Court of Appeal, and had as colleagues for a short time Mr. Chief Justice Harrison and Mr. Justice Adam Wilson. When Mr. Harrison died in the following year Chief Justice Hagarty was transferred to the Queen's Bench, Judge Wilson became Chief Justice of the Common Pleas, and Matthew Crooks Cameron came from the Bar to fill the place in the Bench to the left of Mr. Hagarty. Those were the palmy days of the Queen's Bench. Never has there been, before or since, so able learned, and active-minded a trio of Judges, sitting together in banco at Osgoode Hall. They did not always agree, but they stimulated each other; a case in the Queen's Bench was always thoroughly well threshed out in those days. The famous three continued together until May, 1884, when Mr. Hagarty became Chief Justice of the Court of Appeal and Mr. Cameron of the Common Pleas, Judge Wilson coming back to the Queen's Bench as Chief Justice, and Mr. O'Connor filling the third place. In November, 1887, upon Sir Adam Wilson's retirement, Mr. Armour became Chief Justice of the King's Bench, with two new colleagues from the Bar. The Court as thus composed continued in what was now the Queen's Bench Division from 1887 until 1901 without change, and the Chief Justice, though a man of very firm will and strong opinions, often almost fiercely expressed, lived on terms of great affection with his two puisnes (Falconbridge and Street)—"boys," as he sometimes termed them, for they were much younger than he—for those fourteen years, at the expiration of which he accepted the position of Chief Justice of the Court of Appeal and of Ontario. He was little more than a year in the position of head of the judiciary of the Province, a position to which, as we remarked at the time, he was well entitled by seniority as well as attainments. In November, 1902, he became a puisne Judge of the Supreme Court of Canada, upon the retirement of Sir Henry Strong

from the Court, and in February of the present year he was chosen by the Imperial Government, on the nomination of the Canadian Government, one of the joint commissioners upon the Alaskan boundary. Having obtained leave of absence from the Supreme Court, he went to England in May, his health being then in a very unsatisfactory state, but his intention being to enter upon the active discharge of his duties as commissioner. When he reached England he was found to be a dying man, cancer of the liver being the cause, and he died in London, after a lingering illness, on the 11th of last month. Doubtless, if he had lived to complete the task which he had barely entered upon, he would have added much to his reputation. With his great industry and clearness of vision he would no doubt have made himself a thorough master of the matters in dispute, and his association with the other keen minds at work upon the same subject would, as those who knew him will recognize, have been a delight and an incentive to him. It was not to be. But the departed Judge has left a great reputation. He was a strong, able, fearless man; a good Judge both of fact and of law: he was not only familiar with the principles of law, but he had an extraordinary knowledge of and memory for cases, and he knew how to use and apply them. While conservative in his liking for the old system of pleading, he was an advanced thinker and a radical in most of his views. He had strong opinions, almost prejudices, about a great many subjects, but, in spite of that, he was an impartial as well as an able Judge, and, although somewhat rough in his methods and often indulging in the exercise of a sarcastic humour, he was popular with the Bar, who learned to appreciate his good qualities. He was buried at Cobourg on the 27th July. He was one who made a distinct impression on men's minds and will not soon be forgotten.

**The New Member of the Alaskan Boundary Commission.**

The appointment by the Imperial Government, on the recommendation of the Canadian Government, of Mr. Allen Bristol Aylesworth, K.C., as one of the Commissioners for the settlement of the Alaskan boundary, in the place of Mr. Justice Armour, deceased, has been well received in Canada.

It has been publicly stated that Mr. Aylesworth was also offered at the same time a seat on the Bench of the Supreme Court of Canada, which he declined. Mr. Aylesworth is not quite 49 years of age, having been born near Newburgh, Ontario, in 1854. He matriculated in the University of Toronto in 1870, and graduated in 1874 with first class honours in mathematics, metaphysics, history, and French, and the Prince of Wales's Prize. He was called to the Bar in 1878; took silk in 1890; was elected a Bencher of the Law Society of Upper Canada in 1892. He has been all his life a tremendous worker. It is thought that in the last ten years he has held at least twice as many briefs as any other man at the Bar of Ontario. He is an eloquent and persuasive speaker. As an advocate his forte is probably the skilful marshalling of facts and presenting his view in a captivating manner. He always appears to have a perfect mastery of his brief. Men marvel that he can be so well prepared in each one of the many cases which he takes up. Long hours of concentrated labour are doubtless necessary before such easy familiarity with complicated facts is attained. Possessed of unbounded ambition, and aided by lifelong habits of industry and careful research, with a good working knowledge of the French tongue, a clear head, and an unprejudiced mind, there can be no doubt that he will thoroughly master the intricacies of the case which will be presented to the Commissioners, and will be a most valuable colleague to the Lord Chief Justice and the Lieutenant-Governor of Quebec. We know of no man in Ontario better qualified to take the position, and, while we congratulate Mr. Aylesworth on the exceptional honour of being appointed, while still a practising barrister, to act with old and experienced Judges and ex-Judges upon an international tribunal, we also felicitate the Government upon their choice.

#### **The Supreme Court Vacancy.**

It has been announced that the Hon. A. C. Killam, Chief Justice of Manitoba, has been appointed to succeed Mr. Justice Armour upon the Bench of the Supreme Court of Canada.

**Scottish Barristers and King's Counsel.**

In Scotland litigants are able to carry on the war with the assistance of a very small number of barristers and an utterly inadequate staff of King's Counsel, if we are to take our own Province of Ontario as a model.

"After a short period of declension," says the London Law Times, "the membership of the Scots Bar shews a tendency once more to increase, the number of advocates at Whitsunday last being precisely 400, inclusive of the Judges. By the addition of five new names at the beginning of the summer session, the roll of Scottish King's Counsel has now reached a total of twenty-seven. The number of juniors in more or less regular attendance at the Parliament House may be taken at about 200, and the number of "silks" at, say, twenty-five, the proportion of silks to stuff gownsmen thus working out at about one to eight."

**Copyright in Law Digests.**

Some interesting litigation is in progress in the United States arising out of the alleged infringement of the copyright in a digest of case law. In *Edward Thompson Co. v. American Law Book Co.* the United States Circuit Court of Appeal for the Second Circuit recently allowed an appeal from an order granting an interim injunction. The plaintiffs are the publishers of two encyclopædias, one of American and English law, the other of Pleading and Practice. The defendants are compiling a work called the "Cyclopedia of Law and Procedure." As stated by Judge Coxe in delivering the judgment of the court, the only act of the defendants which was complained of was this: Lists of all the cases bearing upon a given subject, including the cases found in the plaintiffs' books, were put in the hands of the editor chosen to develop that subject. The list of the plaintiffs' cases contained authorities not found in the digests. The original reports of these cases were examined by the editor, and, if the cases were found applicable, they were cited by him in support of his article, if not, they were rejected.

The question before the court, therefore, was: Is a copyrighted law book infringed by a subsequent work on the same

subject where the only accusation against the second author is that he collected all available citations, including those found in the copyrighted work, and, after examining them in text books and reports, used those which he considered applicable to support his own original text?

The Court was of opinion that this question must be answered in the negative.

"The doctrine contended for by the plaintiffs," said Judge Coxe, "extends the law of copyright beyond its present bounds, and if pushed to its logical conclusion will inflict a far greater injury upon literature than it can ever expect to prevent. If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress.

"It will be found upon examining the reported cases that there has been a finding of non-infringement unless it appears that the whole or a part of the copyright work has been copied, either *in haec verba* or by colourable variation."

This is, of course, only an interlocutory decision, but the matter is one of considerable interest and importance, and therefore worthy of attention even at this early stage of what will probably be a protracted litigation.

#### **The American Bar Association.**

The 26th annual meeting of the association will be held at Hot Springs, Virginia, on the 26th, 27th, and 28th August, 1903. The president's address will be given by Mr. Francis Rawle, of Philadelphia, the well known author, and a paper will be read by Sir Frederick Pollock.

#### **Recent American Decisions.**

*Arrest.*—An attachment in a suit for breach of promise of marriage is held, in *Mainz v. Lederer* (R.I.), 59 L. R. A. 954, not to be authorized by a statute authorizing attachment upon the filing of an affidavit that plaintiff has a just claim against defendant that is due, upon which he expects to recover a sum sufficient to give jurisdiction. The other authorities as to right to attachment or order of arrest in breach of promise cases are collected in a note to this case.



*Assault.*—One who is assaulted in a public street is held in *State v. Bartlett* (Mo.), 59 L. R. A. 756, to be justified in using a deadly weapon to defend himself from a public whipping by one greatly his superior physically.

*Bills and Notes.*—The maker of a negotiable instrument who delivers it to the payee complete in all its parts is held, in *Bank of Herington v. Wangerin* (Kan.), 59 L. R. A. 717, not to be liable thereon, even to an innocent holder, after the same has been fraudulently altered so as to express a larger amount than was written therein at the time of its execution.

*Carriers.*—Carriers who, having transported goods at consignor's risk C.O.D., present a bill to the consignee before delivering them, knowing facts which indicate that they have been damaged in transit, are held, in *Hardy v. American Express Co.* (Mass.), 59 L. R. A. 731, to be bound to disclose such facts, or to be liable to return the money collected in case the consignment is rejected by the consignee.

To hold the carrier responsible for an injury received by a passenger while using an excursion ticket, one of the conditions on which is that the passenger assumes all risk of accident, it is held, in *Crary v. Lehigh Valley R. Co.* (Pa.), 59 L. R. A. 815, that he must shew affirmatively that the carrier was guilty of negligence which caused the injury.

Although a railway company enters into a joint contract with another company for the transportation of goods to a point beyond the end of its own line, it is held, in *Union State Bank v. Fremont, E. & M. V. R. Co.* (Neb.), 59 L. R. A. 939, to be competent for it to enter into an express contract with the shipper limiting its liability to the transportation of the property over its own line.

*Cheque.*—In the absence of special circumstances, it is held, in *Edminsten v. Herpolsheimer* (Neb.), 59 L. R. A. 934, that a cheque must be presented not later than the day following its receipt, in order to hold the drawer liable, where the payee receives it in the place in which the bank on which it is drawn is located.

*Master and Servant.*—Undertaking to work as a brakesman, or continuing at work without complaint, with knowledge that the railway company habitually exceed the speed fixed by ordinance in running trains through a municipality is held, in *Martin v. Chicago, R. I. & P. R. Co.* (Iowa), 59 L. R. A. 698, to be an assumption of the risk of such excess of speed, so far as the protection of the ordinance is concerned.

A master is held, in *Duntley v. Inman, Poulsen & Co.* (Or.), 59 L. R. A. 785, not to be liable for the death of a servant because he failed to furnish a better belt shifter where the one furnished was safe and suitable when properly used, and the servant made no objection to using it.

A railway section hand thrown from a hand car by the application of the brakes by a brakesman, without warning, on the signal of the foreman, is held, in *Thacker v. Chicago, I. & L. R. Co.* (Ind.), 59 L. R. A. 791, to have no right of action against the railway company for the resulting injuries under a statute making an employer liable for injuries caused by the negligence of a fellow servant who at the time was acting in the place and performing the duty of the employer in that behalf.

A person employed to watch the personal property of a company stored upon the real property of another is held, in *Holler v. Ross* (N. J. Err. & App.), 59 L. R. A. 943, not to be acting within the line of his duty where he shoots a person trespassing upon the realty, because that person refuses to go off the premises or to halt or throw up his hands at his command.

The negligence of a fire boss whom the owner of a mine is required by statute to employ, is held, in *Schmalstieg v. Leavenworth Coal Co.* (Kan.), 59 L. R. A. 707, to render the master liable for an injury to an employee caused thereby.

*Municipal Corporation.*—The contraction of smallpox by a guest from an inmate of the house who is conceded to have contracted the disease because of the unlawful location of a pest hospital near by is held, in *Henderson v. O'Halaran* (Ky.), 59 L. R. A. 718, to be the proximate result of such unlawful location, so as to render the city liable for the injury thereby caused to the guest.

## BOOK REVIEWS.

**The Law of Compensation.**—A Code of the Law of Compensation under the Land Clauses Acts, and other statutes relating to the compulsory purchase or injurious affecting of land, together with an Appendix, containing Forms and Precedents: The Arbitration Act, 1889: \* \* \* Specimens of Valuations made for the purpose of Compensation; and Valuation Tables: by Sylvain Mayer, B.A. (Lond.), Ph.D., Barrister-at-Law. London: Sweet and Maxwell, Limited: Waterlow and Sons, Limited: 1903. (38s. cloth.)

This is a new and valuable work covering the law of compensation upon the taking of lands, or injuriously affecting lands, under expropriation proceedings, known by our American cousins as the Law of Eminent Domain. The book is a valuable working tool in this country, because the expropriation provisions contained in our various Railway Acts, Municipal Acts, and other statutes, permitting the Government, and various public and private corporations, to expropriate lands, or rights and privileges connected therewith, are based upon and more or less closely follow the provisions of the English Land Clauses Acts. The accuracy of such a book cannot be effectively tested apart from the protracted use of the book in actual practice, but it is not difficult to form an opinion upon the general plan of the work, including its scope, its completeness, its method of statement, and its convenience of arrangement. The above extract from the title page indicates the scope of the work. Its completeness is indicated by the fact that there are 352 pages dealing with the Land Clauses Consolidation Acts, and 73 pages dealing with the Railway Clauses Consolidation Act; that there are between 1,700 and 1,800 cases cited; that it contains an annotated reprint of the Arbitration Act, 1889; that it contains the Waterworks Clauses Act, the Public Health Acts, the Local Government Acts, the Metropolis Management Acts, the Metropolitan Paving Act, the Housing of the Working Classes Act, and numerous other Acts, nearly all of which are annotated; that

it contains fifty-five precedents of forms connected with expropriation proceedings; that it contains twenty-four specimen valuations, such as Valuation of Trade Premises held on a Long Lease, Valuation of Trade Premises held on a Short Lease, Valuation of Freehold Land taken out of an Estate, with injurious affection to Remainder, Valuation of Freehold Houses let to Weekly Tenants, etc., etc.; and that it contains nine Valuation Tables valuing Annuities, Reversions, and Perpetuities, and giving the Expectation of Life, etc., etc. Its methods of statement are indicated by saying that the author has adopted the plan of making it "a Code of the Law of Compensation" by formulating propositions of law in connection with the construction of the various sections of the statutes referred to, and that these propositions are in the form of a code, and that each proposition is based upon cited cases. Its convenience of arrangement has already been, in some degree, indicated, and that may be supplemented by saying that its index covers over 90 pages.

It may be possible that some critic may be able to hunt down some expression of opinion in the book which is not exactly "according to Hoyle," but we have no hesitation in saying that, taken as a whole, the work is a creditable specimen of workmanship, both from the standpoint of the author and the standpoint of the publisher.

A. H. M.

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**Mayne's Treatise on Damages**—Seventh edition, by John D. Mayne of the Inner Temple, Barrister-at-law, and Lumley Smith, of the Inner Temple, K.C. London: Stevens and Haynes: 1903. (28s. cloth.)

A new edition of Mayne is always welcome. The present has been carefully revised and corrected, and contains all the English and Irish decisions bearing on the law of damages which have been reported since 1899. The question of remoteness of damage which has of late been so much discussed in reference to what has been called "mental shock," receives adequate and indeed exhaustive treatment. The new edition is clearly typed and well indexed.

# THE CANADIAN LAW TIMES.

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SEPTEMBER, 1903.

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## PRESUMPTION OF SURVIVORSHIP: THE COMMON LAW AND THE ROMAN LAW.

THE question of survivorship in cases where several persons have met their death by the same calamity, is one which has received different treatment at the hands of the Roman law and the common law of England. As a result, such a point would, under certain circumstances, be differently decided in Ontario and in Quebec—the Civil Code of Lower Canada having adopted, to some extent, the rules which are now included in the Code Napoléon. A brief examination of the subject may, therefore, not be without interest.

Dealing first with the common law, it may be said that in such cases it admits no presumption, either of survivorship or of contemporaneous death. That is, there is no presumption of law. The question is one entirely of fact, and, therefore, from evidence of the attending circumstances, it may be presumed that one survived the other. The surrounding elements and the physical condition of the deceased may thus be considered in each case. In this respect (as will be seen later) the Roman law differs, inasmuch as it raises certain presumptions of law; and the majority of the legal systems founded on the Roman law originally contained artificial presumptions of survivorship based on the supposed strength of the deceased as estimated by their respective sexes and ages, or state of health.\*

\* The Spanish Code lays down the presumption (applicable only in default of evidence) that the death of the persons in question occurred simultaneously. The Belgian and Polish Codes contain certain presumptions; but none are recognized by the laws of Italy, Russia, or Holland.

The law of England on this point, however, was not always so firmly settled as it is at present. The earlier cases shew that in the days when, in the Ecclesiastical Courts at least, the civil law had some weight, the views of the civil jurists were always vigorously advanced at the argument, and were even sometimes adopted in the judgment.

The question as to the presumption of survivorship where two or more persons have met their death through the same accident, first came up prominently in England in the case of General Stanwix. The latter, his second wife, and a daughter by a former marriage, sailed from Ireland to England on the same ship. The vessel was never heard of after leaving port. The next of kin of General Stanwix applied for letters of administration, and this was opposed by one who would have been entitled had the daughter survived her father, which, according to the argument on his behalf, was a presumption of law. So far as this point was concerned the case was never decided. A compromise was effected on the advice of Lord Mansfield, who said that he knew of no legal principle upon which he could adjudicate the matter (*a*). In this case the famous Fearné is said to have composed two ingenious arguments—one in favour of each contention (*b*).

In *Mason v. Mason* (1816), 2 Merivale 308, the facts were that the testator, who was a man of middle age, and his son, sailed from Calcutta on a ship which was lost at sea, all on board perishing. The Master of the Rolls (Sir W. Grant) held that no presumption could be raised as to which of the two had survived the other. In the course of his judgment he said: "There are many instances in which principles of law have been adopted from the civilians by our English Courts of Justice, but none that I know of in which they have

(*a*) This case is reported as *R. v. Dr. Hay* (1767), 1 W. Bl. 640. There are also two earlier cases: *Hitchcock v. Beardsley*, West Rep. temp. Hardwicke, 445; and *Broughton v. Rendell*, Cro. El. 503, where a father and son being hanged together, it was presumed that the latter had survived—on account, however, of evidence to the effect that he had seemed to struggle the longer.

(*b*) See Fearné's Posthumous Works, p. 38, which the writer has not been able to obtain. The fact is referred to in the preface of the 5th edition of Fearné on Contingent Remainders, published in 1831.

Charles Fearné, who was a member of the Inner Temple, died in 1794, at the age of 45.

adopted presumptions of fact from the rules of the civil law. In General Stanwix's case, I thought the stress of the argument to be in favour of the representatives of the father. There were three contingencies; either the daughter survived the father, or the father the daughter, or both perished at the same instant. In the first of these cases alone would the representatives of the daughter have been entitled, those of the father in either of the two last; there were, therefore, two chances to one in favour of the latter. In the present case, I do not see what presumption is to be raised; and, since it is impossible you should demonstrate, I think that, if it were sent to an issue, you must fail for want of proof."

Wright v. Netherwood, also reported as Wright v. Sar-muda (1793), 2 Phill. Ecc. Rep. 266 note (a) was a curious case decided by the Ecclesiastical Courts. The testator had made a will, leaving the bulk of his property to his first wife, by whom he had several children. After her death he married again, and had one child. Together with his second wife and his children by both marriages he embarked on a ship which was never heard of after leaving port. Probate of the will was granted to the executor, but this was afterwards attacked. It was contended, on one side, that the second marriage revoked a will made prior thereto. On behalf of the executor it was argued by Sir William Scott that there was a distinction in such a case between a will made by a bachelor before marriage, and one made by a married man or a widower with children before a second marriage—the latter having, in any event, to consider the rights of his children. Sir William Wynne, however, said in the course of his judgment that no such distinction existed—the implication of revocation arising in either case. He held, however, that in the absence of evidence to the contrary, it was to be presumed that all perished at the same time; that therefore the testator had neither wife nor children at the time of his death, and that for that reason the will made during the first marriage had its full effect.

In Taylor v. Diplock (1815), 2 Phill. Ecc. Rep. 261, a husband had appointed his wife executrix and residuary legatee. Husband and wife were drowned by the foundering

of a ship. The Court granted administration with the will annexed to the next of kin of the husband, holding that in order to entitle the next of kin of the wife it was incumbent on them to prove her survivorship.

In *Sillick v. Booth* (1842), 6 Jurist 142, Knight Bruce, V.-C., held that two brothers having perished by the loss of the same ship, it was proper to admit evidence tending to shew that one was stronger and more robust than the other, and to conclude thereon that the stronger had survived his brother. This appears to amount to raising a presumption of law based upon age and strength. In *Taylor on Evidence*, 9th ed., it is referred to (at p. 175, note 3) as "A finding of fact under the particular circumstances." But in *Barnett v. Tugwell* (1862), 31 Beav. 232, Sir John Romilly, M.R., said that, in accordance with *Underwood v. Wing* (referred to *infra*), those who claimed to take on the ground that the children survived their father, the testator (all three having perished in the same accident), must prove the facts of such survivorship before being entitled (c).

In *re Phené's Trusts* (1870), L. R. 5 Ch. 139, was a case dealing with the presumptions arising from continued absence. The subject was gone into very fully, and it was finally settled that although after seven years the presumption of death arose, there was no presumption as to the time within that period at which the death had occurred; that being a matter of evidence, the onus of proving which fell upon the person seeking to fix the death at some particular time. Thus Giffard, L.J., said (at p. 152): "The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence." This statement of the law is equally applicable to the case of survivorship.

(c) See also *Durant v. Friend* (1857), 5 DeG. & Sm. 343; and (amongst cases decided by the Ecclesiastical Courts), *Selwyn's Case* (1831), 3 Hagg. Ecc. 748. In the *Goods of Murray* (1837), 1 Curt. 596, and *Tatterthwaite v. Powell* (1838), 1 Curt. 705. In the earlier case of *Colvin v. Proc.-Gen.* (1827), 1 Hagg. Ecc. 92, where a husband, wife, and infant perished in the same disaster, the Court seems to have been of the opinion that there was a presumption of law that the husband had survived the others.



In the recent case of *In the Goods of Alston*, [1892] P. 142, it appeared that a husband and wife had made identical wills, each appointing the other universal legatee and sole executor. Both perished on a ship which was never heard of after having been sighted on 6th September, 1890. Upon a motion for a grant of administration with the will annexed of the estate of the husband to one of his next of kin, the President (Sir F. Jeune) said: "The best way out of the difficulty, I think, is to make a grant of administration with the will annexed, with leave to swear the death as having occurred on or after September 6th, 1890." This was done, and a similar grant was, on motion, made to one of the next of kin of the wife.

And in *In the Goods of Benyon*, [1901] P. 141, where a missionary, his wife and children, were all thought to have met their death in a massacre in China, administration was granted to the next of kin of the husband and wife respectively, affidavits being made to the effect that they were believed to have died intestate, and that there was no reason for thinking that either had survived the other.

The leading case, however, is that of *Wing v. Angrave*, 8 H. L. C. 183, decided by the House of Lords in 1860 (*d*). There a husband and wife had each made a will devising and bequeathing property to the other, the same to go to one William Wing, if the prospective devisee and legatee died in the lifetime of the testator. Each of these wills named William Wing as executor jointly with the husband and wife respectively. The husband and wife were drowned, being carried overboard from the deck of a vessel by the same wave. The evidence shewed that the husband was a strong man, who was able to swim, while the wife was in a weak state of health and unable to swim. The House of Lords held that when two or more persons perished by the same accident no presumption of law as to survivorship arose from age or sex; while, on the other hand, there was, in such a case, no presumption of law that all died at the same time.

(*d*) See also *Underwood v. Wing* (1854), 19 Beav. 459, and 4 DeG. M. & G. 683, in which a decree was given similar to that appealed from and affirmed in *Wing v. Angrave*, *supra*.

Lord Campbell, L.C., said (at p. 197): "Reference was made to the Code Napoléon, but, according to our jurisprudence, where the question arises, which of two individuals who perished by the same calamity, survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. In the present case, if the question had been tried by a Judge governed by the Code Napoléon, he must have treated it first as a question of fact, to be decided by the circumstances and evidence, for the incidents of the shipwreck are detailed by an eye-witness, who saw both the husband and wife carried off by the fatal wave in which they perished. According to the Code Napoléon, '*la présomption de survie est déterminée par les circonstances du fait, et à leur défaut, par la force de l'âge ou de sexe.*' Therefore, till the Judge had come to the conclusion that the circumstances proved a perfect equipoise, he could not have resorted to the presumption of law, which, in the absence of satisfactory evidence, he is bound to respect. But with us such a question is always from first to last a pure question of fact, the onus probandi lying on the party who asserts the affirmative."

And Lord Chelmsford said (p. 220): "With respect to the question upon the fact of survivorship when two persons are swept away together by a calamity like that which happened in this case, it is possible that there may be evidence to prove distinctly which was the survivor, as where one of them has been seen struggling with the waves after the other has sunk, and never again appeared above the surface. But where two persons are at one and the same instant washed into the sea and disappear together, and are never seen again, more, it is not possible for any tribunal called upon judicially to determine the question of survivorship, to form any judgment upon the subject which can be founded upon anything but mere conjecture derived from the age, sex, constitution, or strength of body or mind of each individual, and as our law has not established any rules of presumption for the rare and extraordinary occasions, the uncertainty in which they are involved leaves no greater weight on one side or the other to incline the balance of evidence either way."

In the same case Lord Campbell stated clearly that not only did the English law recognize no presumption based on sex or age, but that, on the other hand, it contained no presumption that, in such a case, the deceased had perished at the same instant. Thus he says (at p. 199): "I need hardly say, that I think there is no foundation for the doctrine erroneously imputed to the Master of the Rolls (for it seems that he never laid it down), where it is left doubtful which of two individuals died first, there is a presumption of law (*juris et de jure*) that they died at the same point of time. I will not say that this is impossible, although time, like matter, is said to be infinitely divisible, but such a presumption is not warranted by decision, dictum, or analogy."

Upon the main question to be decided in *Wing v. Angrave* the majority of the House of Lords held that, according to the true construction of the two wills, Wing was obliged to shew affirmatively that one of the two testators had survived the other; and that, in the absence of proof to that effect, the property went as if no will had been made by the husband, and no power of appointment had been exercised by the wife (e).

The English law upon this point, has, therefore, been definitely settled since the decision in *Wing v. Angrave*. The doctrine may be summarized by an extract from a standard text-book (f) which, after stating that in their treatment of

(e) Upon this point Lord Campbell dissented. The words used by the wife in her will were: "And in case my said husband should die in my lifetime, then I appoint to the use of William Wing, his heirs, etc., to and for their own absolute use and benefit." The Lord Chancellor did not consider this to be "merely a bequest to William Wing on the condition of proof being adduced that the husband of the testatrix died in her lifetime." He was of the opinion that the clear intention of the testatrix was that Wing should take the property if her husband did not; and that, therefore, the case came within those reviewed and affirmed by Page Wood, V.-C., in *Warren v. Rudall*, 4 K. & J. 603, "which establishes the doctrine that where by a will property is given over, on the failure, in a particular manner, of a prior gift, and the will shews that it was the testator's clear and certain intention that the devisee or legatee over should take on failure of the prior gift, howsoever that gift may fail, the devisee or legatee shall take on failure of the prior gift, although the prior gift fails in a manner different from that specified in the will."

(f) *Best on Evidence*, 9th ed., p. 347-8. Kent seems to have been of the same opinion. In his *Commentaries* he says: (13th ed., vol. 2, p. 436-7): "The English law has, perhaps prudently, abandoned as delusive all those ingenious and refined distinctions which have been raised on this vexed question by the civilians."

the question, "the lawyers of Rome and France lost sight of the salutary maxim '*nimia subtilitas in jure reprobatur*,' proceeds as follows: "The English law has judged more wisely; for, notwithstanding some questionable dicta, the true conclusion from the authorities seems to be, that it recognizes no artificial presumptions in cases of this nature, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight; i.e., as a circumstance proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof. When, therefore, a party on whom the onus lies of proving the survivorship of one individual over another has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this that the law presumes both to have perished at the same moment: this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because if it cannot be shewn which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment."

It may be added that throughout the United States (with the exception of the State of Louisiana) the same rule has been adopted as that which prevails in England. There have been a few decisions imputing a presumption, either of instantaneous death or otherwise—but the majority of the decided cases are based upon the doctrine above stated.

In *Coyle v. Leach* (1844), 8 Metcalfe (Mass.) 371, a father, seventy years of age, and his daughter, thirty-three years of age, perished by the loss of the same ship. The Court refused to adopt any presumption of survivorship, and denied the applicability of the rules in force in Louisiana. It also held, however, that it was to be presumed that both died at the same instant.

In *Newell v. Nichols* (1878), 75 N. Y. 78, it was held that the burden of proof rested on those who claimed through

an alleged survivorship. And a similar conclusion was arrived at in *Fuller v. Linzee* (*g*).

The State of Louisiana, of course, possesses a legal system based upon the Roman law. It has, therefore, included in its Civil Code those rules into which the Code Napoléon crystallized, so far as possible, the somewhat conflicting opinions of the jurists upon the subject of presumption of survivorship (*h*).

As already mentioned, the Roman law was inclined to establish presumptions of law upon the question. The point was one, however, upon which the various schools of civilians never agreed, and the earliest continental decisions are, therefore, by no means in unison.

The Parliament of Paris decided that in the cases arising from the St. Bartholomew's Day Massacres, the presumption was that parents perished before their children, as they would naturally be destroyed first so that they could not interfere with the assassination of their offspring.

But this seems to be really a presumption arising from the surrounding circumstances, and not a presumption of law.

A similar decision was also given, for the same reason, in the case of the daughter of the famous Dumoulin, who, with her two young children, was murdered by robbers in 1572 (*i*).

On the other hand the law of the 21st Prairal, passed in the Year Four, enacted that, as between persons executed on the same day, it should be presumed (in the absence of a proces verbal of the execution or other definite evidence) that the youngest had survived. This, of course, was not based upon any probability of survivorship by reason of age, sex, or strength, but was merely the adoption of the doctrine that,

(*g*) (1883), 135 Mass. 468. See also *Cowman v. Rogers*, 73 Aa. 403; *Johnson v. Merithew*, 80 Maine 111. Also the other American decisions referred to in *Greenleaf on Evidence*, 16th ed., p. 126, note 5.

(*h*) See the Civil Code of Louisiana, Articles 936-939.

(*i*) See *Burge's Colonial Law*, vol. 4, p. 14 *et seq.*

It was also both contended and denied that, in the case of a brother and sister perishing together, the presumption must always be in favour of the survivorship of the brother.

The various doctrines which different jurists have advocated regarding the whole question are epitomised in *Burge's Colonial Law*, vol. 4, p. 11-12. See, also, *Beck's Medical Jurisprudence*, 12th ed., p. 639 *et seq.*

when evidence was lacking, the law of nature should be followed.

The articles of the Civil Code of Lower Canada which relate to this subject read as follows:

"603.—Where several persons, respectively called to the succession of each other, perish by one and the same accident, so that it is impossible to ascertain which of them died first, the presumption of survivorship is determined by circumstances, and, in their absence, by the considerations of age and sex, conformably to the rules contained in the following articles.

"604.—Where those who perished together were under fifteen years of age, the eldest is presumed to have survived;

"If they were all above the age of sixty, the youngest is presumed to have survived;

"If some were under the age of fifteen and others over that of sixty, the former are presumed to have survived.

"If some were under fifteen or over sixty years of age, and the others in the intermediate age, the presumption of survivorship is in favour of the latter.

"605.—If those who perished together were all between the full ages of fifteen and sixty, and of the same sex, the order of nature is followed, according to which the youngest is presumed to have survived.

"But if they were of different sexes, the male is always presumed to have survived."

The rules contained in Articles 720 and 721 of the Code Napoléon are substantially the same as those in Articles 603 and 604 supra; though the last paragraph of the latter Article is not to be found in Article 721 of the Code Napoléon. The next Article of the French Code does not, however, correspond with Article 605 of the Code of Lower Canada. On the contrary, it reads as follows:

"722.—If those who perished together were of the full age of fifteen years and less than sixty, the male is always presumed to have survived when there was an equality of age, or if the difference did not exceed one year.

"If they were of the same sex, the presumption of survivorship which opens the succession in the order of nature, must be admitted: thus the younger must be presumed to have survived the elder" (*j*).

While the terms of the Articles in the two Codes are not exactly the same, yet all are based on the same principle, and (apart from such exceptions) decisions rendered or conclusions arrived at in France would doubtless be followed in the Province of Quebec. The commentators who have written since the promulgation of the Code Napoléon, however, have differed from each other nearly as much as did the jurists who flourished before that time (*k*).

For instance, one intricate point which has excited much controversy, is what should be the decision (and upon what grounds) in the case of twins.

Avoiding such questions, however, and taking as a guide the preponderance of modern authority, it may now be considered as settled that the presumptions of survivorship established by the Code apply only to cases where the commorientes were respectively called to the succession of each other, and where such succession is *ab intestato* (*l*). Also, that these presumptions are exceptional in their nature, and that their application cannot, therefore, be extended to cases not specially provided for by the Code (*m*). Thus even before the Code Napoléon it was held that the law of the 20 Prairal of the Year Four did not apply to any case except that of executions (*n*). While since the Code has been in force, it has been held that the presumptions thereby established did not apply where several persons living in the same house were successively assassinated by the same person—on the ground that each assassination was a separate act, and that

(*j*) The Code of Louisiana lays down practically the same rules as the Code Napoléon. See Articles 936-939.

(*k*) Demante, for instance, devotes a number of pages to an exposure of what he considers to be the divers errors of other writers.

(*l*) The latter part of this proposition is supported by a judgment given at Bordeaux, 29th January, 1849. (See Sirey, 1849, part 2, 625). But while it has been decided that the Articles only apply to *ab intestato* successions, yet it has also been held that they can be invoked by others, such as legatees or creditors.

(*m*) Toullier, vol. 2, part 2, par. 78, is of a contrary opinion.

(*n*) Decision given at Rennes, 17th April, 1821. The law of the 20 Prairal of the Year Four is still in force in France.

those so killed did not, therefore, "perish by one and the same accident." It was also held there, that, in such a case, the presumption that the younger had survived the elder,—the order of nature,—could not be invoked (*o*). Moreover, it seems to be now settled that the presumptions are only relevant in the class of cases specifically mentioned in Article 720 of the Code Napoléon (Article 603 of the Civil Code of Lower Canada), where there is no evidence regarding the calamity in question which might lead to a conclusion on the point. "All the means of proof admitted by the common law should first be exhausted to establish the order in which the deaths of the commorientes occurred; then only will the Judge be able to resort to the presumptions of survivorship" (*p*).

Baudry-Lacantinerie & Wahl (*q*) also says that in cases to which the rules laid down in the Code do not apply (as, for example, when the persons who perished by the same accident were not respectively called to the succession of each other) and in which there is no evidence tending to throw any light on the point, the two commorientes will be considered to have died at the same instant. He states that this is the doctrine adopted not only by various continental codes, but also by the Courts of the United States. It is submitted that, on the whole, the United States has elected to follow the rule laid down in England, which is to the effect that in such a case there is no presumption whatever,—not even the presumption that both died at the same time (*r*). It must be admitted, however, that though the English law differs in this respect, yet the practical result will often be the same.

Article 603 of the Civil Code of Lower Canada (Article 720 of the Code Napoléon) says that when it is impossible to determine which died first, "the presumption of survivorship is determined by circumstances" before recourse is had

(*o*) Decision of the Tribunal of Lyons, 21st March, 1877 (Sirey, 1880, part 2, p. 55). See also a decision of the Tribunal of the Seine, 8th April, 1865. (Gazette des Tribunaux, 9th April, 1865.)

(*p*) Translation of extract from Baudry-Lacantinerie & Wahl, *Des Successions*, vol. 1, p. 68, part 132—citing a decision given at Paris on 7th August, 1886.

(*q*) *Succession*, vol. 1, p. 66, par. 129.

(*r*) See Greenleaf on Evidence, 16th ed., p. 126, note 5. The English law on this point is emphatically stated by Lord Campbell in *Wing v. Angrave*, 8 H. L. C. 183, at p. 199, quoted *supra*.



to the presumptions laid down by the Code (s). This is in accordance with the spirit of Article 1242 of the same Code (Article 1353 of the Code Napoléon), which reads as follows: "Presumptions not established by law are left to the discretion and judgment of the Court" (t).

The discretion of the Court is absolute as regards the appreciation of such presumptions (u). It has been said (and denied) that these "circumstances" which the Court may estimate comprise not only those pertaining to the calamity itself, but also such as relate to the physical force, state of health, or special knowledge of the commorientes (v). Thus, where it was proved that one of the latter could swim, and the other could not, it might be presumed in the case of a shipwreck that the former had survived the latter. In the English view of the matter this is simply allowing the Court to impose presumptions of law at its own discretion,—and is, of course, directly opposed to the decision of the House of Lords in *Wing v. Angrave*, 8 H. L. C. 183 (w)—where the husband was a strong man who knew how to swim, and his wife was in bad health, and unable to swim in any event.

In the Province of Quebec, the question of the application of these articles of the Civil Code arose in the case of *Busby v. Ford* (1893), R. J. Q. 3 S. C. 270. It appeared there that F., while mentally deranged, had possession of a razor, and after struggling with several of the members of his family, he was seen hacking his own throat with it. A few minutes later the

(s) In the Code Napoléon the phrase in place of the word "circumstances" is "circonstances du fait"—literally, "circumstances of the fact."

(t) The article in the Code Napoléon to which this article corresponds goes much further. It reads as follows (translation): "Presumptions which are not established by law are left to the discretion and prudence of the Judge, who should only admit important, precise, and harmonious presumptions, and only in cases where the law admits testimonial proof, unless the act is attacked on the ground of fraud or deceit." It has been urged in France that when the Judge determines the presumption of survivorship according to the circumstances he is bound by the provisions of this article. See *Baudry-Lacantinerie & Wahl, Successions*, vol. 1, p. 69.

(u) *Baudry-Lacantinerie & Wahl, Successions*, vol. 1, p. 69-70.

(v) *Decision Cour de Cassation*, 21st April, 1874.

(w) A decision apparently in accordance with the French view was that rendered in *Sillick v. Booth* (1842), 6 Jurist 142, which in Taylor on Evidence, however, is referred to (9th ed. p. 175) as "a finding of fact under the particular circumstances."

house took fire, and was totally burned. The bones of a woman were found among the débris of the bed occupied by F.'s wife. The Court stated clearly that the case (which turned on the effect of a marriage contract) was not one to which the provisions of Article 604 applied. "This Article is limited to ab intestate successions where several persons are respectively called to the succession of each other. The pretensions of survivorship put forward by plaintiffs must be sustained by proof. In its absence we would be forced to the legal position that, perishing by the same calamity, neither survived the other" (x). Upon the evidence, the Court came to the conclusion that the wife predeceased her husband.

It remains to consider the effect of these different rules of law, and their mode of application, where the commorientes were not subject to the same jurisdiction. Such a case might very well arise in this country.

A. is sixty-two years of age, and domiciled in the Province of Quebec; B. is fifty-seven years of age and domiciled in the Province of Ontario. Neither of them has made a will, and each is, respectively, called to the succession of the other. They perish in the same shipwreck, and there is absolutely no evidence regarding the calamity or the attending circumstances. What disposition will be made of their estates?

According to the law of Ontario there would be no presumption either of survivorship or of simultaneous death,—B.'s estate (as would also A.'s if subject to the laws of that Province) would devolve upon his personal representatives.

According to the law of Quebec there would be a legal presumption that B. had survived A., and had, consequently, succeeded to the latter's estate.

The practical working out of the above case would not be without difficulty. But it would be less complex than if B., fifty-seven years of age, had been domiciled in Quebec, and A., sixty-two years of age, had been domiciled in Ontario.

Probably, however, it is only when there is a conflict between the laws applicable to the respective estates of the

(x) Per Davidson, J., at p. 275-6.

deceased (or, to part thereof—the immovable or movable portion) that any serious obstacle will be encountered.

The three principal doctrines on this subject are as follows:—

(1) That the law of the last domicile governs the disposition of the whole estate,—real and personal (*y*). This theory found its strongest advocate in Savigny. The principal countries in which it is in force at the present day are Chili and the Argentine Republic.

(2) That the law of the *loci sitæ* applies to the whole estate, real and personal. This is the doctrine adopted by the Russian jurists.

(3) The intermediate rule is, that the *lex loci sitæ* governs the disposition of the real estate, and the law of the last domicile of the deceased regulates that of the personal estate of the deceased. This is the rule applied in England,\* the United States, and France; and also in Austria, Belgium, Holland, Sweden, Roumania, Mexico, and Peru,—with the variation that in these latter countries the national law of the deceased applies to his personality (*z*).

(*y*) The terms “realty” and “personalty” are not exactly interchangeable with “immovables” and “movables.” For the purposes of this article, however, no distinction is here made.

\*Since the above was written, a decision has been rendered in England which possibly conflicts with the general statement that the law of the last domicile regulates the disposition of the personal estate.

The head-note of *In re Johnson, Roberts v. Attorney-General*, [1903] 1 Ch. 821, reads as follows: “Where a British subject, whose domicile of origin is colonial, acquires, according to English law, a domicile of choice in a country whose laws do not recognize domicile, but distribute the movables of a foreigner dying within their jurisdiction according to the law of his nationality, and dies there, the English Courts will distribute his movables according to the law of his domicile of origin.”

Mr. A. V. Dicey, K.C., deprecates the judgment given in this case (which he hopes may be carried to the House of Lords) upon the ground (*inter alia*) that it is “in the most distinct manner opposed to the doctrine universally laid down in English cases and in English text books of authority, that succession to a man’s movable property is governed by the law of his domicile at the time of his death.” (See *The Law Quarterly Review*, July, 1903, pp. 244-246).

On the other hand, the editor of *The Law Quarterly Review* (Sir Frederic Pollock) defends the judgment in answer to this criticism.

(*z*) In Germany the national laws govern the disposition of the whole estate. Despagnet (3rd ed., 1899) says, at p. 682, that there is a reaction in France in favour of the national rule. The judicial decision he cites in apparent support of this proposition is not of very recent date, having been given by the Tribunal of Havre in 1873. (*Sirey*, 1872, part 2, p. 313.)

As between the Provinces of Ontario and Quebec, therefore, there would be no contest on that point,—both the English and the French law having embraced the same doctrine.

Thus, as regards realty, Wharton (2nd ed.), after referring to the theory that the law of the domicile should govern the whole estate, says (at par. 560): “But, however this may be, the law both in England, the United States, and France is clearly settled, that in these countries, in matters of succession, realty is governed by the *lex rei sitæ*.”

Respecting personalty, it has in several cases been distinctly laid down by the House of Lords that the law of England is that the question as to the person entitled to succeed to the personalty of an intestate is to be determined by the law of the domicile of such intestate; and, that, moreover, a judgment of the Courts of that jurisdiction upon that point is conclusive (a). In *Abd-De-Messih v. Farra* (1888), 13 App. Cas. 431, Lord Watson said (at pp. 437-8): “It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends not upon nationality, but upon domicile alone; and, consequently, that the law of the testator’s domicile must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession ab intestate. That doctrine was clearly explained by Lord Cranworth in *Enolin v. Wylie*, 10 H. L. C. 19. Accordingly, the tribunal in which the estate of a deceased is to be administered, if it be not itself the forum of the domicile, must defer on all these points to the law of the domicile, and accept that law as its only guide.”

The above principles are, it is submitted, those upon which the hypothetical cases above put would be decided. That is, that the succession to the real and personal property of each of the intestates would be governed by the *lex loci sitæ*, and by the law of the last domicile of the deceased owner, respectively.

Thus where A., sixty-two years of age, was domiciled in Quebec, and B., fifty-seven years of age, was domiciled in Ontario, the presumption according to the law of the former Province being that B. survived A., A.’s personalty (even if it was comprised, for instance, of property actually in On

(a) See *Enolin v. Wylie* (1862), 10 H. L. C. 1.

tario), would devolve upon B.'s legal representative in Ontario—as would also so much of A.'s realty as was situated in Quebec. On the other hand, A.'s realty in the Province of Ontario would descend to his own next of kin.

Then where B., fifty-seven years of age, was domiciled in Quebec, and A., sixty-two years of age, was domiciled in Ontario, A.'s personalty, and so much of his realty as was within the Ontario jurisdiction, would devolve upon his legal representative; but his realty situated within the Province of Quebec would go to B.'s next of kin.

Few of the English authorities on the conflict of laws deal directly with this question,—but the above solution appears to be consonant with the rules they lay down upon analogous subjects. On the other hand, a number of the continental jurists have dealt with the problem more or less fully,—and, though the conclusions they have arrived at are by no means similar, it is thought that the above is the view taken by the majority of the modern authorities.

Baudry-Lacantinerie says (b) (translation): "In international law, the question whether there exists a legal presumption of survivorship to the profit of one person is governed by the law applicable to the devolution of the succession of the person who is claimed to have died first."

And again (translation) (c): "By the application of the system which we follow on this latter question, we decide that, as regards immovables, the presumptions are determined by the law of their situation, and as regards movables by the law of the domicile of the deceased. . . . A conflict may arise, so far as the movables are concerned, when the two deceased are governed by different laws; in that case the succession of each is referred to the law of his domicile; certain authors claim that in such a case their deaths should be considered to have been simultaneous; no theoretical reason justifies such a solution." \*

(b) *Des Successions*, vol. 1, p. 81, par. 150.

(c) *Ib.* p. 82.

\* In an article recently published in the *Journal du Droit International Privé* (vol. 29, at p. 427), the conclusion is arrived at that in the case of contrary presumptions, arising from the different laws by which the commorientes are governed, the one neutralizes the other, and consequently all the deceased must be presumed to have died simultaneously.

Weiss and Desbagnet are the chief supporters of the view last referred to and repudiated by Baudry-Lacantinerie—and their opinions are also condemned by Bar, who says (*d*) that they “propose to decide according to the probabilities of each case, i.e., to give effect to neither law. That is capricious, and very often there is no probability in the matter.”

Other doctrines referred to and rejected by Baudry-Lacantinerie, are that the question should be governed by the law of the domicile of the person in whose favour the presumption of survivorship is invoked; or, again, that it should be settled according to the national law of the deceased,—a rule which, as he points out, would only be applicable provided one admitted that the disposition of the entire estate should be regulated by such national law.

Bar (*e*), after stating that in the case of husband and wife the question of community is to be determined not by the personal law (the law of the last domicile) of the deceased, but by the law of the first matrimonial domicile (*f*), proceeds as follows: “The case is otherwise where the question is one as to a presumption of death, where the exact moment of death cannot be fixed; in such questions the law which rules the succession in other respects must prevail. (See Brocher, 1, 414; Weiss, p. 847). If, however, two persons perish together in consequence of the same event, and if in such a case the personal law of A. presumes that B. lived longer than A., and proceeds on the footing of B. thus becoming A.’s heir, while B.’s personal law rejects this presumption, or perhaps sets up the contrary presumption, viz., that A. was the survivor, then A.’s nearest of kin must be B.’s heirs, and B.’s nearest of kin must be A.’s heirs, the order of succession among the respective nearest of kin being, however, in the former case determined by the law which prevails in A.’s

(*d*) Bar on Private International Law, 2nd ed., translated by G. R. Gillespie, note to p. 805.

(*e*) Bar on Private International Law, p. 804-5.

(*f*) A similar conclusion was arrived at by the House of Lords in the case of *De Nicols v. Curlier*, [1900] A. C. 21. There, a husband and wife having been married in France, where, by the very fact of marriage, the wife (in the absence of contract) acquires community of property, it was held that the husband could not bequeath all his movable property away from his wife, even though the same had been acquired in England after such marriage.

country; in the latter case by the law of B.'s country. Thus each law will have its effect within its own jurisdiction."

It was held by the Superior Court of Bavaria on 17th May, 1890 (*Sammung*, vol. 13, p. 50), that the question whether there is a legal presumption of survivorship in favour of one of the deceased who is called to the succession of the other should be decided by the law of the former,—upon the ground that the question of capacity in matters of succession is governed by the law of the last domicile of the person called to the succession.

In a note to the report of this decision given in the *Journal du Droit International Privé*, 1892, p. 1046,—it is said that it is in accord with the doctrine of Savigny and a number of other jurists; but that it conflicts with the views of Wächter, Bar, Stobbe, and Roth, who consider that those questions should be decided by the law of the testator (i.e., of the person who is alleged to have died first). Weiss puts the case of two Italians (whose own law admits no presumption of survivorship) perishing in the same accident, leaving property in France. He is of the opinion that the Italian law would apply, even to the immovables in France; and that, on the other hand, if two Frenchmen died under similar circumstances, leaving property in Italy, it would be governed by the provisions of the Code Napoléon respecting the presumptions of survivorship.

Referring to the case where the deceased have different nationalities, Weiss rejects Bar's attempt to apply both laws concurrently as leading to complications and inconveniences,—and prefers to say that (in the absence of direct evidence) they will be presumed to have died at the same instant (*g*).

But the solution above set forth of the question propounded may claim the authority (in addition to the others cited) of Brocher (*h*), who expresses the conviction that there is no doubt that the presumptions of survivorship are applicable to succession governed by the French law, whatever may

(*g*) Weiss, *Droit International Privé* (1881), vol. 4, p. 549-551.

(*h*) Brocher, *Droit International Privé* (1882), vol. 1, p. 414-415.

The opposite view is maintained in a recent work. See Joussetin, *Les Conflicts de Lois relatifs aux Successions* (1899), p. 55-58.

be the place where the incidents, the proof of which is in question, have occurred. Whilst even one of the authors who apparently favours the presumption of simultaneous death where the laws of the commorientes conflict, admits that in France at least (and surely it would be the same in England) the immovables will be governed by the law of their situs, irrespective of the national law of the deceased. He says (i) (translation): "If they (the commorientes) belonged to different countries, the laws of which do not agree upon this point, it seems that the divers deaths should be considered as having taken place at the same instant. But according to the French jurisprudence, so far as the immovables situated in France are concerned, there is no reason to take into consideration (*se préoccuper de*) the national law of the various commorientes, since the devolution of their successions should be governed by the law of the situation of the property."

Finally, attention may be drawn to a point which would be of importance in dealing with such cases,—the mode of proof. Regarding this Baudry-Lacantinerie says (j) (translation): "The proof of the facts invoked in support of the legal presumption, or to combat this presumption, is made according to the law of the country where the suit takes place (*ou a lieu la contestation*) conformably to the general principles of international law."

Montreal.

L. MAXWELL LYON.

(i) Huc (1893), vol. 5, p. 37-38.

(j) Baudry-Lacantinerie & Wahl, Successions, vol. 1, p. 83, par. 151 bis. Brocher says (vol. 1, p. 414) that the old rule of *locus regit actum* will always keep its authority.



## RECENT CASES FROM THE TIMES REPORTS.\*

**Action of Review.]**—That an action of review may still be brought is recognized in *Charles Bright and Co. v. Sellar*, 19 T. L. R. 623, but not, that case decides, in order to get rid of an attaching order, first because from that order there might have been an appeal, and secondly because it was not a judgment and did not finally determine the rights of the parties.

**Arbitration and Award.]**—It was held in *In re Great Western R. W. Co. and His Majesty's Postmaster-General*, 19 T. L. R. 636, that an award based on figures given in evidence cannot be set aside on the ground that, having regard to its amount, some of the figures must have been misunderstood, or misapplied.

**Bank.]**—In *In re Valletort Sanitary Steam Laundry Co.*, 19 T. L. R. 593, an unsuccessful attempt was made to impeach security given to a bank by a company by way of equitable mortgage, on the ground that the bank had received from another customer debentures of the same company, which contained a condition that no charge in priority to these debentures should be given. This was, the Court thought, pushing the doctrine of constructive notice too far, and a banker is not, it was held, bound in dealing with one customer to keep in mind the exact nature of securities held by it from its other customers.

**Carrier.]**—In *Stephen v. International Sleeping Car Co.*, 19 T. L. R. 621, the plaintiff was held in the County Court entitled to recover the full amount paid by him for sleeping car fare, the sleeping car having, owing to the heating of an axle, been taken off before its destination had been reached. There was a condition on the back of the ticket that in the event of the car not being able to reach its destination only

\* Including the cases in No. 33, Vol. 19, week ending August 5th, 1903.

such proportion of the fare should be returned as corresponded to the distance untravelled, but it was held that the plaintiff's assent to, or knowledge of, this condition had not been made out, and *Richardson v. Rowntree*, [1894] A. C. 219, was applied. An appeal to the Divisional Court was dismissed, that Court pointing out that it is a question of fact in each case as to what the contract is, and that when there is a contest whether conditions are known it is not sufficient to shew that they appear in print, and might have been read by the passenger.

**Company.]**—What is a “public allotment” of shares was the point for decision in *Smith v. Charing Cross, etc., R. W. Co.*, 19 T. L. R. 614, the plaintiff's remuneration as general manager of the company depending upon whether such an allotment had been made. The company had been formed by the plaintiff, and an unsuccessful attempt had been made to issue its shares. After this another promoter formed a construction company, and this company constructed the line, most of the defendant company's shares being allotted to it in payment. It was held that this was not a “public allotment.”—In *Stroud v. Royal Aquarium, etc., Society*, 19 T. L. R. 656, a resolution upon the voluntary winding-up of a company to pay gratuities to certain officers was held, upon the complaint of dissentient shareholders, to be ultra vires the Companies Act providing that upon a winding-up the assets, after payment of liabilities, are to be divided among the shareholders.—In *In re British America Corporation*, 19 T. L. R. 662, a contract between two companies was held invalid, the directors in each company being the same and there being therefore an infraction of the provision that no director should vote in respect of any contract in which he was interested, his interest as shareholder in the second company being sufficient to disqualify him.

**Contempt of Court.]**—To settle for a pecuniary payment in proceedings for contempt of Court, is, it is held in *The King v. Newton*, 19 T. L. R. 627, in itself contempt of Court. Such proceedings are, the Court pointed out, analogous to and in the nature of criminal informations which are incapable

of settlement.—The *King v. Parke*, 19 T. L. R. 627, in connection with which the previous application arose, decides that proceedings for contempt may be taken in the High Court in respect of newspaper comments made before a prisoner has been committed for trial.

**Copyright.]**—In *Springfield v. Thame*, 19 T. L. R. 650, it was held that the plaintiff, who had written and sent to a newspaper an account of an accident, had no copyright in the remodelled and to a considerable extent rewritten account actually published in the paper.—The judgment of the Judicial Committee affirming that of the Court of Appeal for Ontario in *Graves v. Gorrie*, 3 O. L. R. 697, is reported 19 T. L. R. 652, the point decided being that the Imperial Fine Arts Copyright Act does not extend to Canada.

**Costs.]**—*Sanderson v. Blyth Theatre Co.*, 19 T. L. R. 660, was an action to recover the price of work done for the defendant company at the request of an alleged agent. The defendant company denied the agency, and the plaintiff added the alleged agent as a defendant, and claimed against him in the alternative as for breach of warranty of agency. The Court of Appeal held that, a verdict having been found against the defendant company and in favour of the agent, the Judge was justified in ordering the defendant company to repay to the plaintiff the costs directed to be paid by the plaintiff to the agent, the joinder of the latter as defendant having been necessitated by the, as was found, untrue defence of the company.

**Criminal Law.]**—In *Rex v. Tuffin*, 19 T. L. R. 640, two prisoners were jointly indicted for murder, and each was also charged with being an accessory after the fact to the murder committed by the other. It was held that the Crown was not bound to elect upon which counts to proceed.

**Crown.]**—That an Act which enacts that it shall not be lawful to drive any locomotive through any town at a greater speed than two miles an hour was not binding on the Crown is the point decided in *Cooper v. Hawkins*, 19 T. L. R. 620,

the Crown not being named in the Act, and there being nothing in the nature of the enactment to make it necessarily applicable. The Court referred to *Hornsey Urban District Council v. Hennell*, [1902] 2 K. B. 73, as giving the rules when statutes should or should not be held to bind the Crown.

**Declaratory Judgment.]**—In *The Manar*, 19 T. L. R. 617, a judgment was granted in England declaring that the plaintiffs were, according to English law, first mortgagees of the ship in question, this judgment being desired for use in France, where a contest as to the plaintiffs' rights was in progress.

**Evidence.]**—"That birth after the mother's marriage is not, legally speaking, unimpeachable evidence of legitimacy, is authoritatively settled by a strong committee (on privileges) in the case of the Poulett Peerage, 19 T. L. R. 644. The claimant was born about six months after the marriage of his mother with the sixth earl. Statements made by her and depositions of the deceased sixth earl were admitted in evidence, and on this evidence it was held that the claimant was the son of a man with whom his mother had had improper relations before her marriage with the sixth earl.

**Expropriation.]**—In *In re Mayor of Tynemouth and Duke of Northumberland*, 19 T. L. R. 630, it was decided that under the Lands Clauses Acts the natural character and position of the land in question, by virtue of which it would necessarily have to be acquired if a reservoir were to be made in the neighbourhood, should be taken into consideration in arriving at its value. The possible expense to the claimant of schools which might have to be established for the children of men employed in the projected works, was held to be too remote and uncertain to be the subject of compensation.

**Fraudulent Conveyance.]**—In *re Slobodinsky*, 19 T. L. R. 616, approaches closely to the "one man company" cases. A man carrying on a bona fide business made large purchases of goods on credit, then formed a joint stock company, transferred all his assets to it, and offered to his creditors in satisfaction of their claims its debentures. There were, apart from the debtor, several bona fide shareholders for, however,

comparatively small amounts. Wright, J., held that though a fraud, both legal and moral, had been committed, the transaction did not come within the statute of Elizabeth, there being a bona fide company and a bona fide sale to it; but he also held that the transfer of the assets was a fraudulent act of bankruptcy, and that the debtor's trustee in bankruptcy was entitled to assert title to the assets as at the date of the transfer, subject to the rights of holders of debentures, as to the extent of which no opinion was expressed. These rights were dealt with on a second application, 19 T. L. R. 651, the judgment depending upon the provisions of the Bankruptcy Act.

**Gaming.]**—The purchase of a right to call for the delivery of certain shares at a certain price on a certain date was held in *Butenlandsche Bankvereinigung v. Hildesheim*, 19 T. L. R. 641, to be a valid transaction, and not a mere bet, and the plaintiffs, who had procured the right for the defendant, were given judgment for the amount paid by them for it, together with their commission. The result might be different, the Court of Appeal pointed out, if there were a tacit understanding that the contract should not be enforced but only differences adjusted on the named day.

**Husband and Wife.]**—A covenant in a separation deed by the husband to pay to the wife a certain sum each week for the maintenance of a child, so long as the child should reside with or under the tutelage or care of the wife, was held in *Rowell v. Rowell*, 19 T. L. R. 657, not to have been put an end to by the child having been admitted to Christ's Hospital School, where he would be provided with everything but boots and underclothing, which the wife had entered into an agreement to provide.

**Lord's Day Act.]**—The judgment of the Judicial Committee is reported, 19 T. L. R. 612, under the somewhat archaic name of *Attorney-General for the Province of Ontario v. Hamilton Street Railway Co.* The refusal of the Committee to answer the hypothetical questions, as in their view a practice "absolutely contrary to principle and very inconvenient and inexpedient," may perhaps have the effect of putting a stop to the practice which has obtained of late

years in this Province of obtaining declaratory judgments as to the meaning of Acts.

**Master and Servant.]**—*Pomfret v. Lancashire and Yorkshire R. W. Co.*, 19 T. L. R. 649, was a case under the Workmen's Compensation Act, in which the question was whether the accident to the deceased workman had occurred in the course of his employment. He fell out of a railway carriage while returning from his work to a station where he was to report. and judgment in favour of his widow was upheld by the Court of Appeal.

**Mortgage.]**—*Hodson v. Deans*, 19 T. L. R. 596, is a useful example of the principle that a mortgagee must not sell to himself, the sale in that case, though by auction, by a society to a member of their investment committee being set aside, the price being inadequate, and the sale proceeding not being in all respects carried on in the best interests of the mortgagor.

**Nuisance.]**—*Ash v. Great Northern, etc., R. W. Co.*, 19 T. L. R. 639, is an interesting case as to a nuisance caused by the exercise of statutory powers. In such a case "reasonableness" and not "necessity" is the test, and if in the carrying on of operations of a public nature all the reasonable care which experience and engineering skill can devise is exercised the work cannot be interfered with, objectionable though it may be to those in its vicinity.

**Particulars.]**—In *Boulton v. Houlder Brothers and Co.*, 19 T. L. R. 635, the defendants were ordered to give particulars of money paid into Court by them in satisfaction of a claim for alleged fraudulent overstatement of the amount expended for repairs insured against by the plaintiffs. The Court of Appeal, reversing the judgment below, held that the ordering of particulars was a matter of discretion, and that the fact that the contest arose as to marine insurance, where the utmost good faith and disclosure were essential, was sufficient to justify the exercise of the discretion.

**Principal and Agent.]**—An agent who secretly accepts commission from the persons with whom he is carrying on negotiations must, as is decided in *Andrew v. Ramsay and Co.*, 19 T. L. R. 620, not only account to his employer for the

commission; but also forfeits any right to commission from his employer, and if the employer has in ignorance of the wrongful act paid commission to the agent he can recover back the amount.

**Revenue.]**—The decision of the Supreme Court of Canada in *The King v. Algoma Central R. W. Co.*, 32 S. C. R. 277, that a foreign built ship is subject to duty, was affirmed by the Judicial Committee: 19 T. L. R. 623.

**Solicitor.]**—*Smith v. Betty*, 19 T. L. R. 602, was an action by the executor of a solicitor against the solicitor's client to recover the amount of a bill of costs for services from 1878 to 1899. A defence of the Statute of Limitations was held effective as to all items incurred prior to 1893, and a taxation of the balance of the bill was directed, judgment to be entered for the amount to be taxed. Upon the taxation it was found that credit had by inadvertence not been given for the amount of a judgment received by the solicitor in 1899. It was held that it was too late after judgment to appropriate this amount in satisfaction of the statute-barred items; that there was no lien upon it except for the costs of the action on which it had been recovered; that the statute-barred items could not be set off against it; and therefore that it must be credited on the bill as taxed.

**Summary Judgment.]**—Where leave to defend is given upon security being furnished to the satisfaction of a Master, there is, it is held in *Hoare and Co. v. Morshead*, 19 T. L. R. 632, no appeal from the Master's decision as to the sufficiency of the security, as in such a case he acts as *persona designata*.

**Trade Name.]**—The judgment in *Weingarten Brothers v. Charles Bayer & Co.*, 19 T. L. R. 239, noted ante p. 159, as to the use of the name "erect form corsets," was reversed by the Court of Appeal [Vaughan Williams and Cozens-Hardy, L.JJ.] *Romer, L.J.*, dissenting. The majority held that the words were merely descriptive and had not acquired a limited secondary meaning. There being at present an equal division of opinion in this case, a further appeal would be of interest.

## EDITORIAL REVIEW.

**Death of Mr. Proudfoot.**

The Hon. William Proudfoot, who died at his summer place near Hamilton, Ontario, on the 4th of August, was nearly eighty years of age, having been born in November, 1823. He was appointed a Vice-Chancellor of Ontario in May, 1874, and retired from the Bench in 1890. For some years after his retirement he was professor of Roman Law in the University of Toronto. He was a scientific and scholarly lawyer, well read in Roman law and with an unusually good knowledge of real property law. In matters of practice and procedure he inclined to technicality even after it had gone out of vogue. He was thought to be a good Judge for the defendant in fraudulent preference and fraudulent conveyance cases, which used to be more common twenty years ago than they are now; he certainly was not apt to "smell fraud." His relations with the Bar were of the ideal sort. A certain stateliness of manner belonged to him, and no one was encouraged by his native kindness to take liberties. He will long be held in affectionate remembrance.

**The Manitoba Bench.**

Mr. Chief Justice Killam, of Manitoba, having been called to the Supreme Court of Canada, the senior Judge of the Manitoba King's Bench, Mr. Justice Dubuc, has been promoted to the Chief Justiceship, and Mr. William E. Perdue, of the Manitoba and Ontario Bars, has been made a puisne Judge of the King's Bench. Mr. Perdue is a good lawyer, and will, we believe, make an excellent Judge.

**Disciplining an Advertising Barrister.**

A barrister and solicitor in Ontario wrote and circulated the following letter:—

"RE SUCCESSION DUTY."

"Dear Sir,—

In the preparation of your will, one of the chief points to which your solicitor will direct your attention, will be the



question of "Succession Duty," which is now payable on all large estates. The proportion of this tax, to which your estate will be liable, depends very largely upon the manner in which you may dispose of your property.

I have made a most careful study of our Provincial Acts relating to this tax, and am the author of the only Canadian text book on the subject. I am prepared to advise, as a specialist, on all questions relating to Succession Duty.

An expert opinion may result in a large saving to your estate. Your own solicitor can't afford the time to analyze the Acts and amendments enforcing this tax as I have done, and I claim, therefore, to be better able to give you sound advice on this one subject.

Let me make suggestions to him before he prepares your will.

Yours truly."

The letter was received by laymen who handed it to their own solicitors, and in consequence two complaints against the writer of the letter were laid before the governing body of the Law Society of Upper Canada. The proceedings upon these complaints are printed as a supplement to Part 4 of Volume 5 of the Ontario Law Reports, and make very interesting reading. The gentleman whose conduct was in question, in answer to the complaints, stated *inter alia*:—

"I compiled a list of all the persons in Ontario whose estates might be liable to taxation, and I sent to a number of these persons in Ottawa, Peterborough, and elsewhere, the letter complained of, enclosing in each the professional card of my firm, my object still being to advertise my book and to increase my consulting practice."

The Discipline Committee of Convocation have found that the gentleman has been guilty of professional misconduct, and he has sent an apology to the chairman of the committee. The report is to be taken into consideration by Convocation on the 17th September next.

#### **Annual Meeting of Ontario Law Associations.**

Delegates from the County Law Library Associations, also from counties not having associations, will meet at Osgoode Hall, Toronto, 3rd September, 1903, at 11 o'clock a.m.

All members of the legal profession of the Province requested to attend.

The following, among other subjects, will be up for discussion :

1. Extension of the power of the local Judges of the High Court of Justice.
2. Increase of Judges' salaries and their exclusion from participating in work outside the regular duties of the office.
3. Bankruptcy legislation.
4. Divorce Court.
5. Municipal assessment.
6. Codification of the municipal law.
7. Dominion assistance to the county libraries.
8. Simplification of the Surrogate forms.
9. Surrogate Court costs.
10. Reduction of disbursements in High and County Court proceedings.
11. Better system of promulgating Rules of Practice.

#### **Lord Justice Bowen and Equity.**

Lord Alverstone's reference to the late Lord Justice Bowen as the only Judge who could properly assess the damages in the intricate Ogden case, recalls to memory, says the Sheffield Daily Telegraph, the possessor of the acutest intellect on the Bench during the long Victorian period. It is said of Lord Justice Bowen that he shared with Lord Milner the repute of being one of the two most brilliant men that Oxford turned out in the latter half of the nineteenth century. His mental refinements were, in fact, almost too subtle for the average mind. His Lordship, however, could never really grasp the principles of equity, and one of the best mots of this vivacious Judge was his extra judicial obiter dictum, " seeking for equity is like a blind man searching in a dark room for a black cat which has no existence."

#### **Judges and Extra-Judicial Work.**

The fact that Sir Francis Jeune, as Judge-Advocate-General is, according to Mr. Broderick's statement in the House of Commons, responsible for the form of the charge on which the officers were tried by court-martial with reference to the "ragging" incident at Mount Nelson Hotel, Cape Town, and that the form and limitations of that charge may be subject

of further criticism, will recall the words of the late Lord Esher at the Mansion House banquet on the 9th November, 1892, when responding to the health of the Judges, and emphasize their wisdom more than a decade after their utterance. Lord Esher, in referring to the independence and impartiality which characterized the action of the Judges, said: "Their education and training made them impartial and determined to do what was right in any question that came before them. This, indeed, was so well known and recognized that when the Judges of England acted within the scope of their ordinary duties nobody ever attempted to suggest that they were not impartial. At the present time, however, they knew that one of the Judges had been asked to go beyond the scope of his ordinary duty, and he, for one, was surprised and sorry that the Judge in question had consented to do so. The result was inevitable. That Judge had been fiercely accused already of partiality or of want of desire to do justice."—*The Law Times*.

#### **The Marriage Law in Victoria.**

A novel point in the law of marriage arose in the Divorce Court at Melbourne, Victoria. The question was whether, a man having married his deceased wife's sister's daughter, the marriage was a legal one. Mr. Justice A'Beckett found that "if the respondent had been a sister of the deceased wife, instead of a niece, the marriage would have been valid under s. 18 of the Marriage Act of 1890 (which allows a marriage with the deceased wife's sister). This Act did not validate marriage with a deceased wife's niece, probably because the necessity of making such a provision did not occur to the framers of the Act. He had, therefore, to give effect to the law as it stood, and declare the marriage null and void, and he made the decree absolute." The case, says the London Law Times, may be taken as a lesson in Parliamentary draftsmanship.

#### **Recent American Decisions.**

*Criminal Law*.—A statute making the penalty for attempt one-half that prescribed for the commission of the offence is held, in *People v. Burns* (Cal.), 60 L. R. A. 270, to be void for uncertainty, in cases where the penalty for the offence is imprisonment for life.

*Defamation.*—Words spoken by a witness in a judicial proceeding concerning a stranger to the suit, which are pertinent to the issues involved, and fairly responsive to questions propounded to him, are held, in *Cooley v. Galyon* (Tenn.), 60 L. R. A. 139, to be absolutely privileged notwithstanding actual malice.

*Divorce.*—A woman who consented to a decree of divorce against her to enable her husband to obtain a grant of property is held, in *Karren v. Karren* (Utah), 60 L. R. A. 294, to have no right, after her husband had married another woman, to have the decree annulled, although, in consideration of her consent, he promised to remarry her after the grant was procured, and the decree was obtained by suppression of facts, and false testimony. The right of a party obtaining or consenting to divorce to contest its validity is considered in a note to this case.

*Evidence.*—Reading on a second trial of a criminal case testimony of a witness who died after the first trial, at which accused was present and represented by counsel, who was accorded the right of cross-examination, is held, in *People v. Elliott* (N.Y.), 60 L. R. A. 318, not to infringe the right of the accused to be confronted with the witnesses against him, in the presence of the Court.

*Infant.*—Services of an attorney in prosecuting for an infant an action to recover damages for an indecent assault upon her are held, in *Crafts v. Carr* (R. I.), 60 L. R. A. 128, to be necessities.

*Insolvent Bank.*—A holder of stock in a national bank, who, without knowledge or suspicion that the bank is insolvent or is likely to prove so, sells the stock, and who does everything reasonably possible to procure a transfer of the shares on the books of the bank, is held, in *Earle v. Carson* (C. C. App. 3rd C.), 60 L. R. A. 266, not to be liable as a stockholder, although the bank is declared insolvent before the transfer is effected, and both the bank and the purchaser were insolvent when the sale was made.

*Landlord and Tenant.*—A landlord is held, in *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* (N. H.), 60 L. R. A. 116, not to be relieved from liability for injury to ten-

ants of a lower floor by the freezing and bursting of an automatic fire extinguisher in the portion of the building retained by him, by the fact that he has employed an independent contractor to keep the building heated.

*Master and Servant.*—A railway company is held, in *Euting v. Chicago and N. W. R. Co.* (Wis.), 60 L. R. A. 158, to be liable for the act of its engine-driver, in whose custody it has placed signal torpedoes, in placing one on the track in dangerous proximity to bystanders, and moving the engine over it for his own amusement, in consequence of which one of the bystanders is injured.

Negligence committed by a servant in the course of his employment, although he acts without the knowledge, or contrary to the known wishes of his master, is held in *Weber v. Lockman* (Neb.), 60 L. R. A. 313, to render the master liable.

*Negligence.*—One participating in a charivari of a wedding party is held, in *Gilmore v. Fuller* (Ill.), 60 L. R. A. 286, to have no right to recover for injuries inflicted by the negligent discharge of a pistol by a co-participant, where the statute imposes a fine upon whoever disturbs the peace of a family or neighbourhood by loud and unusual noises, or disturbs any assembly of people met for a lawful purpose.

An occupier of land who undertakes to burn rubbish thereon is held, in *Paolino v. McKendall* (R. I.), 60 L. R. A. 133, to be under no obligation to guard children of tender years, who are in the habit of resorting there to play, from injury by approaching the fire.

Erecting in or beside a highway a crane for delivering mail to passing trains, which, when the mail bag is strung upon it, is calculated to frighten horses of ordinary gentleness, is held, in *Cleghorn v. Western R. Co. of Alabama* (Ala.), 60 L. R. A. 269, to be negligence which will render the railway company liable to one who is injured by the frightening of his horse thereby, although the bag is actually placed in position by government employees.

*Parent and Child.*—A mother who owns the property, takes care of the family, and who, by express direction amounting

to a relinquishment of the father's right, is entitled to the earnings of their child, is held, in *McGarr v. National and P. Worsted Mills (R. I.)*, 60 L. R. A. 122, to have the right to maintain an action to recover for the loss and expense to which she is subjected by injuries negligently inflicted by a third person upon the child.

*Railway.*—One purchasing a round-trip railway ticket good only on the day of purchase is held, in *Illinois Cent. R. Co. v. Harris (Miss.)*, 59 L. R. A. 742, to be entitled to recover damages in case he is ejected from the only train passing his station on the return trip on that day, for the reason that the ticket is not good on that train because the train is not scheduled to stop at that station.

A railway company which delivers a defective car to a connecting line is held, in *Missouri, K. & T. R. Co. v. Merrill (Kan.)*, 59 L. R. A. 711, not to be liable in damages to an employee of the latter, who is injured by reason of such defect after the car has been inspected by the company receiving it.

Injury to a child by a turntable to which children were in the habit of resorting, to the knowledge of the company and its employees, is held, in *Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.)*, 59 L. R. A. 920, to render the railway company liable, where it took no means to prevent the children from playing on the turntable, and failed to keep it guarded or properly fastened.

*Restraint of Trade.*—One who sells a trade, goodwill, and business, covenanting to warrant and defend the same, is held in *Ranft v. Reimers (Ill.)*, 60 L. R. A. 291, to have no right after resuming business, to solicit trade from his former customers to the injury of the buyer.

*Sale of Goods.*—One who purchases from the manufacturer an emery wheel, upon which the manufacturer has placed a placard warranting the speed capacity of the wheel and who sells it in the same condition as when received from the manufacturer, but without any express representation as to its capacity, is held, in *Pemberton v. Dean (Minn.)*, 60 L. R. A. 311, not to adopt the warranty of the manufacturer as his own by such sale.

# THE CANADIAN LAW TIMES.

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OCTOBER, 1903.

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## JOB FOR JUDGES.

A LITTLE analysis and explanation seem to be very necessary. The employment of the judges may for present purposes be divided into three classes:

(1) Adjudications respecting property and rights.

(2) Collateral functions: such as declarations of opinion as to interpretation of statutes, or legislative powers, revision of voters' lists, and so on.

These jurisdictions are sometimes granted to a court, and sometimes to any judge of a court as *persona designata*; sometimes there is special remuneration attached to the work, and sometimes there is none. And the feature which sharply distinguishes this second class of cases from that which is to follow, is the fact that the statute prescribing the work ascertains also the person to do it, and fixes the remuneration.

(3) Jobs—as I choose to call them. Governments in this class of cases are authorized by statute to issue commissions in respect of a variety of subjects; to give the work to any judge they choose; and to pay him what they please.

This analysis affords a very complete answer to those who have urged that in order to be consistent in my objection to jobs to judges, I must be opposed to the trial by the courts of election petitions. If we class election petitions, as we should, with all other appeals to the courts for adjudication respecting rights, we see at a glance the essential distinction between trying a right to a parliamentary seat, and

accepting a job. If a dispute arises as to who is mayor, or alderman for Ward Two, the courts settle it. If I am unlawfully deprived of my seat in my church, I go to the courts for relief. And when the under-dogs in the Parliamentary committee fights got enough of that sort of justice, and became the majority, the courts were authorized to adjudicate as to House-seats also. A right to a place in Parliament is a legal right, and the courts now ascertain and declare such rights, precisely as in all other cases—that is in litigation instituted for the purpose. Clearly this has nothing to do with my objection to jobs.

This analysis will enable me also to answer those who think that judges ought not to “mix themselves up in politics,” but that they might properly accept jobs of the quieter sort. I see no reason why judges, in the discharge of their duty to administer justice, should not mix themselves up in politics, or church quarrels, or angry controversies of any and every kind, so far as may be necessary for the settlement of disputed rights. No, it is not what sort of cases ought to come before the judges that we are interested in here; but the very different question, How ought the cases to get there?

Take the Gamey-Stratton inquiry. Precisely the same investigation might have taken place had Mr. Gamey's charges been made upon the platform, and had Mr. Stratton sued for libel; and the same judges, one way or other, might have heard the case; and there would have been no objection, and no outcry, and no abuse, and the result would have been impressive. But when a Government attacked, itself appoints the judges, and arranges their remuneration—well, we have experienced the natural result.

The character of the controversy or investigation then is wholly immaterial, provided always that the case comes before the judges in the ordinary course of the administration of justice; and this brings us sharply to the question, Why, if it be admitted that all sorts of questions may properly be examined by judges, make such a fuss about the mere manner in which they may get to their Lordships?



There are two sorts of jobs—one of them is bad and the other worse; one relates to non-contentious and the other to contentious matters.

The periodical revision of the statutes is of the first class, and I am asked what is more in accordance with the fitness of things than that a judge should undertake the work? But if I assent to the fitness (*a*), I hasten to add, make then the revision of the statutes part of the regular work of the judges, and I am satisfied. But leave it among the jobs, and I object. I object upon the ground that the judges ought to be free from governmental or any other influence. Is it not the fact that the political parties now-a-days are more interested in litigation than any other organization? Is it not, therefore, now more than ever, necessary that the independence of the judiciary should be rigidly maintained?

I gather that public opinion is unanimously with me in objection to the reception of railway passes by the judges. But why, if not upon the principle of the independence of the judges? Is the distinction between a governmental job and a railway pass, that one is earned and the other a gift? Very well. Now suppose that the Canadian Pacific Railway Company employed a judge to audit its accounts and paid him a reasonable salary for the work, is the objection to such employment removed by the fact that the money is earned? Not in the very slightest; the railway has a judge in its employment—that is the point and the objection; and Judge Cooley, eminent as he was, lost his re-election to the Michigan Bench after 28 years of excellent service there, because the voters saw impropriety in that very situation.

(*a*) In truth I do not assent. I am inclined to think that in the United States (where the essential distinction between the legislative and judicial departments of government is so well understood and so frequently in mind) the employment of the judiciary in the compilation of the laws would have a strong tinge of unconstitutionality in it. I believe that it is well to insist upon the complete separation of these departments. A judge, I think, will handle much more impartially statutes in the construction of which he has had no part. I do not want as interpreters those who have personal grounds for defending certain interpretations.

When a judge takes a government job he may nominally be in the employment of the King, but in reality he receives his instructions from the politicians who have plenty of litigation before him, and who regulate his pay. If judges can maintain untarnished their reputation for integrity, although they take favours from governments and at the same time sit in cases in which these same governments are deeply interested, what objection is there to a judge employing his leisure time (which is said to be his own) in auditing the Canadian Pacific Railway Company's books?

This idea of the essential necessity of maintaining the independence of the judges is in danger of being frittered quite away. The good old maxim "Once a Puisne, always a Puisne" (a), represented the intensity of the conviction that judges may not always be single-minded if left open to temptation; and now that the maxim has been abandoned, what a flutter do we not see among the Puisnes upon every vacancy of a chief seat? And what a mental casting-up of accounts with Ottawa there must be? For fear that ageing judges, in dread of enforced retirement, might cringe a little, they were made irremovable except upon an address of the two Houses; and Canada has almost always had senility upon the Bench, because independence of the men there, was thought to be more important than their mental fitness. Curiously enough, we maintained this irremovability long after the introduction of the prize-packet system gave Governments a power to purchase goodwill with hard cash. It is yet in substantial operation.

The jobs, then, of the first sort, although of non-contentious character, are obnoxious because of the fundamental necessity for judicial independence. Jobs of the other class

(a) Faith in it remains with the Minister of Justice, but not that faith which moves colleagues, unfortunately. Very happily the other day the Minister suggested that there should be inscribed over the entrance to the Bench, some of the words which Dante found written over a certain "portal's lofty arch" which led to a somewhat different place:—"All hope abandon, ye who enter here"—"all hope of advancement, all hope of higher remuneration" the Minister said; and may we not add, "all hope of jobs, too."

(contentious matters) are objectionable not only for this reason, but also upon the ground that they involve the injustice of the choice of judge by one only of the parties to the controversy. The attempted answer is that the judges—all the judges—are perfectly impartial, and that it is consequently immaterial who makes the selection. To which the sufficient reply is that judges are not all out of the same mould; that any barrister will tell you which of the judges would be the best for your particular sort of case, and that if he could always fill the Bench as he wished, he would much more rapidly fill his own pockets, by winning more of his cases.

Very much more harm is done by this second class of job than by the first, for (1) they attract very much greater notice, (2) they are sometimes met with fierce opposition, and (3) the element of injustice in them affords a not unreasonable objection to them, and to submission to their findings. But after all they are but the natural outcome of the job habit in its more insidious, if less publicly obnoxious, form. They are, all of them, a dangerous encroachment upon the independence of the Bench.

I take my stand upon this: I ask any practitioner of twenty-five, twenty, or even ten years' standing, "Does the Canadian judiciary occupy the same position in public estimation to-day as within your recollection?" Now, do not answer "Yes, in the minds of all reasonable people;" for a great many people (as you think) are very far from being reasonable, and yet it is important that they, too, should have a good opinion of the judges. Admittedly, then, there has been a serious change for the worse in this respect, and the question we have to consider and get a good reply to, at our peril, is, "What is the cause of the change?" My answer is, Jobs. If there be any better let us have it.

That these jobs have not heretofore evoked much comment or condemnation must be attributed to the great respect which the Canadian Bar has always entertained for the Bench, and because of a very natural indisposition to criticize those whom, upon the whole, you admire, and whose mental attitude towards yourself is of some consideration to you. Let us be

glad, then, of the Gamey and Treadgold cases, if they have at length forced us to consider our position, to investigate and ascertain the true foundation of the evil which is upon us, frankly to state it, and resolutely put an end to it.

JOHN S. EWART.

Winnipeg.

N.B.—For removal of some curious misapprehensions arising out of my address to Mr. Justice Perdue, let me say that I spoke my own words, and not those of any other person or of the Bar; and that I had no thought of suggesting that Chief Justice Killam, or any other of the judges whom I named, had ever accepted railway passes.

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## COURTS CHRISTIAN.

One of the earliest documents in the Imperial statute book is that known as the Statute of Merton, 20 Hen. III. c. 9, in which is embodied the memorable declaration of the Barons of England of their unwillingness to change the law of England as to a matter in which it conflicted and still conflicts with the civil and canon law. Its wording is somewhat peculiar. When done into modern English it reads as follows:

“To the King’s writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered: That they would not, nor could not, answer to it; because it was directly against the common order of the Church. And all the bishops instanted the lords that they would consent that all such as were born afore matrimony should be legitimate as well as they that be born within matrimony, as to the succession of inheritance, forasmuch as the Church accepteth such for legitimate. And all the earls and barons with one voice answered that they would not change the laws of the realm which had been hitherto used and approved.”

There are two or three things which must strike the reader as curious about this piece of statutory law. There is first “the King’s writ of bastardy;” what was it? why was it directed to the bishops? and what right had they to say anything at all in the matter? and why should they “instant” the lords to alter the law? and how came it that the law which they favoured differed from the law of England? In order to solve these questions it is necessary to go back to the beginnings of our legal history, and, indeed, to the early history of the Christian Church; and, doing so, we find that in the ancient times the Christian Church was accorded a legal jurisdiction in many matters, and played an important part in the administration of the law.

Beginning its career as a purely voluntary society, and for three hundred years absolutely ignored by the State, except for the purposes of persecution, it suddenly emerged from a position of worldly inferiority, and comparative obscurity, to one of enormous power and world-wide influence and importance, even from a secular standpoint,—a position from which it has never been ousted, although since the Reformation its legal jurisdiction has been very considerably curtailed; and in some places within the British dominions (Canada, for instance) entirely taken away.

It can hardly be seriously contended that the Christian Church has any inherent legal jurisdiction in many of those matters which were formerly within the jurisdiction of the Courts Christian, or that it has any inherent coercive jurisdiction of any kind, except so far as coercion can be exercised by purely spiritual pains and penalties, or is voluntarily submitted to by its members, and then its jurisdiction can hardly be said to be coercive in the sense in which that word is generally understood.

It may be, therefore, taken as a self-evident proposition that all such coercive legal jurisdiction as the Courts Christian heretofore at any time possessed was due to the fact of its having been conferred upon them expressly or impliedly by the secular authority or government. (See Hale's Hist. C. L. p. 45).

This species of authority first came to be conferred on the Christian Church in the time of Constantine, circ. A.D. 320, When that monarch became a convert to Christianity and adopted the Christian religion as the official religion of the Roman Empire, a change of the most momentous and far-reaching consequences was effected in the relations of the Church to the State, the effects of which to this day are more or less operative, not only in this country, but in every country where the Christian religion prevails.

The age of Constantine was indeed a crucial turning point in the history of the Christian Church in many ways: the temporal benefits and patronage which the Church then and in succeeding ages received from Christian states were the beginnings not only of its temporal grandeur and power, but

also in many respects, it must be confessed, the occasion of its spiritual deterioration. The declaration of its Divine Founder, that His Kingdom was not of this world, was too often forgotten by those who eagerly sought positions of honour in the sacred ministry; not so much for the good they might do others, but for the fancied good they might do themselves; and the pursuit of temporal wealth, power, authority, and influence through ecclesiastical avenues was purchased at the sacrifice of that self-denial and self-sacrifice which are the chiefest glories of the Christian faith. Wealth and worldly power and prosperity are certainly better calculated to promote pride, luxury, and ostentation than humility and other spiritual virtues; and yet the task of reconciling these incompatible conditions was the task imposed upon the Christian Church by the fatal gift of secular patronage. The Church, though a divine institution, is nevertheless composed of fallible human beings, and it is hardly to be wondered at that it failed to come out of the ordeal of contact with worldliness, pomp, and power, unscathed. It has been said that the origin of the Courts Christian is probably due to the injunction of S. Paul, found in the 1 Cor. 6.1, urging Christians not to go to law before the unbelievers, but to refer their disputes to "the saints," members of the Christian faith. This injunction was given at a time when the only other alternative was to submit to the ordinary tribunals of the country, presided over by pagan judges. The Christian tribunals which S. Paul suggested must therefore of necessity have been nothing more than mere courts of arbitration with no legal status or coercive powers to carry out their decisions—and we must therefore rather refer the origin of the Courts Christian to the time when they first acquired a legal status.

For the first 300 years after Christ it is clear that the courts of the Church, if any there were, had no status whatever in the sphere of law. Its ecclesiastical or spiritual jurisdiction was purely domestic, and unrecognized by the State in any part of the world. Prior to the year 320 all causes relating to wills, administration of deceased persons' estates, matrimony, bastardy, adultery, and other matters which afterwards came to be called ecclesiastical

or spiritual causes, were, throughout the Roman Empire, merely civil cases, and determined by the rules of the civil law and subject only to the jurisdiction of the civil magistrate. But from the time of Constantine onwards the professedly Christian emperors, out of respect to the bishops of the Christian Church, and a desire to promote Christian principles, granted jurisdiction to bishops in many matters which directly or indirectly affected, or related to, religion; thus, jurisdiction was given to them in the matter of tithes, because they were paid to the ministers of the Church; in relation to matrimony and rights flowing therefrom, because marriage was generally celebrated in the Church, and as time went on marriage came to be esteemed a "sacrament;" and thus it was that questions of legitimacy, dower, divorce and jactitation of marriage came within the ecclesiastical cognizance. In England, jurisdiction was conferred on ecclesiastical courts in relation to wills and intestate estates; because wills were often made when the testator was in extremis, and in presence of, and under the advice of his spiritual guide, and were considered to be altogether defective and indeed reprehensible if they did not contain gifts "for pious uses," and the due execution of wills was therefore considered in England properly to belong to the courts of the Church; and in the invocation of the name of the Deity, and the solemn bequest to Him of the soul of the testator, which we find in many modern wills, we may doubtless trace the hand of the ecclesiastics of a bygone age; and where a deceased person died intestate it was considered that *pro salute animæ*, it was necessary that some part of his possessions should be devoted to pious uses; and in England the administration of such estates was also committed to the Courts Christian. The executor and administrator were the delegates of the ordinary (i.e., the bishop of the diocese), as to-day they in form remain the delegates of the Surrogate Judge, who, with us, fills the place of "the ordinary."

In matters of spiritual delinquency, which were more in the nature of sins than crimes at law, and which, therefore, could not well be punished in the ordinary secular courts, such as fornication, adultery, solicitation of chastity, as also



blasphemy, apostacy from Christianity, heresies and schisms, and matters relating to the order and discipline of the Church, as the ordering of clerks, celebration of divine service, etc., jurisdiction was, from time to time, given to the ecclesiastical courts, not merely as domestic tribunals, but as courts recognized by law, whose sentences could be enforced by the power of the State.

The jurisdiction at first conferred on the bishops of the Church and her courts by Constantine was perpetuated and enlarged by his imperial successors, and when the disintegration of the Western Empire took place, in all the fragments into which it was broken this jurisdiction was maintained.

Thus the Church gradually rose to power on the ruins of the Empire, and found in the converts which she made of the barbarian conquerors of the Western Empire as warm and steady supporters as those they had overthrown.

As we trace the rise and progress of ecclesiastical jurisdiction, it is not difficult to see that from the moment this alliance between Church and State began, it was the constant and persistent aim and object of the ecclesiastical authorities, through all subsequent ages, to enlarge and extend their jurisdiction, and they were not slow to assert even a concurrent jurisdiction, based on the theory of "connexity," in many matters which were obviously within the jurisdiction of the civil courts. Whenever a man was sworn to observe a contract, the oath was administered by an apostolic notary, and as the violation of the oath was a sin, and the judge of sin was the ecclesiastical judge, therefore he must determine the cause; by this process even contracts were drawn within ecclesiastical cognizance.

The dissolution of the Roman Empire was followed by the dark ages, in which, for nearly a thousand years, learning was at a low ebb, and ignorance and superstition ran riot in the world. It was an age fruitful of all sorts of spiritual corruption, and ecclesiastical authorities did not scruple to make the most holy rites of the Church and the hopes and fears of people the means of swelling ecclesiastical revenues, which, in many cases, were spent in luxury and extravagance. During this period the languages of modern Europe were in

the process of formation. There was consequently no literature; all learning, such as there was, was in the hands of ecclesiastics, and the power which this gave them they were only too ready to use for what they were pleased to consider the good of "The Church," which, translated, meant too often their own sordid and ambitious desires. Thus, everywhere, the bishops of the Church acquired and maintained a well recognized position in the State, at first due to the respect which was generally entertained for their sacred office; but, later on, by reason of the position they acquired as wealthy and powerful landowners. But their jurisdiction in the legal arena, though on the continent of Europe generally exercised in special courts of their own, within certain defined limits, does not appear to have been so exercised in England in Anglo-Saxon times; there the spiritual and civil jurisdictions were blended, and the bishop and the earl sat together in the county courts to administer justice, the bishop, as it was quaintly said, to inform the people of the law of God, and the earl to inform them of the law of the land. In this court the causes of both the Church and commonwealth were heard, and disposed of, and this procedure was at least as old as the time of Canute, who ordained that the shire-gemote should be held twice a year, and oftener if need require, "wherein the bishop and the alderman of the shire shall be present, the one to teach the laws of God, and the other the laws of the land."

But with the coming of William the Conqueror all this was changed. He, no doubt, was influenced by the contrary system which prevailed in Normandy, and one of his first acts was to ordain that such of the English ecclesiastical laws as did not accord with the canon law should be amended so as to conform therewith; and he forbade ecclesiastics to sit any longer in the hundred courts; and he also forbade his secular judges to entertain causes which pertained to the discipline of the soul: and the ecclesiastical courts were thereafter enjoined to administer the canon and episcopal laws, and the secular courts were forbidden thereafter to concern themselves with spiritual causes.

This was the beginning in England of the jurisdiction of the Courts Christian as separate tribunals.

We are now beginning to understand why the King's writ of bastardy was addressed to the bishops. This was evidently a matter within their cognizance, because legitimacy depended on the fact of marriage, which was one of the subjects within the ecclesiastical jurisdiction, and questions of birth and legitimacy were, therefore, brought also within ecclesiastical cognizance.

Thus we read in Bracton, that where in an action in the King's Court bastardy was objected, "that the inquest concerning bastardy or legitimacy should be transmitted to the Court of Christianity, and upon the inquest having been held the inquest should be remitted to the Court of the King." (Twiss's Bracton, vol. 6, p. 419; see also *ib.* vol. 4, pp. 329 and 501.)

But the question still remains: how came it that on this question of legitimacy there should be any difference between the law of the Church and the law of the land?

When legal jurisdiction was first conferred on Courts Christian by Constantine, the Church had no developed system of law of its own, and it adopted the rules of the Roman civil law so far as they were not opposed to the principles of the Christian faith, and on this question of legitimacy "*per subsequens matrimonium*," they saw fit to adopt the ancient Roman law; hence it came to pass that the Courts Christian in England, following the practice of the Courts Christian on the continent of Europe, came to regard issue born out of wedlock as legitimated by the subsequent marriage of the parents, although that was contrary to the common law of England.

As time went on, a vast body of canon law was evolved by the Christian Church in the west which superseded in the Church courts the civil law wherever they were in conflict.

Intimately connected with the question of the legal jurisdiction of the Courts Christian was that of the Papal claim to be the ultimate court of appeal in all ecclesiastical causes. This, too, was not any inherent right appertaining to the occupant of the see of Rome, but was one that was acquired

by convention, consent, or acquiescence. In England it is said that it was not till the time of Stephen that any appeals were carried to the Pope from England (Hale's Hist. Com. Law, p. 163, note (a)). They were not allowed on inquests as to legitimacy even in Bracton's time: see Twiss's Bracton, vol. 4, p. 501.

We are accustomed to speak of this claim of the Pope's to exercise appellate jurisdiction in ecclesiastical causes as an usurpation. There is no doubt that from the time of Constantine onwards, and particularly from the age of Hildebrand, the bishops of Rome were constantly making demands having for their end the increase of the power and influence of the occupant of that see. As the imperial power faded away in the imperial city, the bishops of Rome laid hold on all the vestiges of imperial power that they could. The title of "Pontifex Maximus," which the emperors had been wont to assume as chiefs of the pagan religion, they continued to use even for some years after Constantine, and did not drop until the time of Gratian, about A.D. 378, when the Roman emperors ceased to use it, possibly from the feeling that such a title was no longer appropriate to a Christian sovereign. This discarded pagan title of the emperors was afterwards taken up, adopted, and is still used as one of the titles of the bishop of Rome. The same spirit which seems to have prompted this step, probably also prompted the occupants of that see to aspire to temporal sovereignty, and when that step had been gained, it is manifest that in order to support a court and all the entourage thereof, money was necessary; and all sorts of demands and exactions were from time to time made upon the Christian people of Europe in order that the Papal exchequer might be replenished. These demands were at first asked as favours, and they were then claimed as of right; such were the Papal claims to sell English benefices, to demand from the appointees of all English bishoprics and benefices the first year's income under the name of "annates," which in the time of Henry VIII. amounted to a sum of £160,000 yearly. (See the Commissioners' report to Valor Ecclesiasticus). This appears to have been equal to

about \$8,000,000 of our money (see Bacon's Lib. Reg. vi.), which was sent out of England annually to maintain the magnificence of the papal court. These claims, extravagant as they may seem to us, for the population of England was then probably not more than that of Canada to-day, were acquiesced in, and at last came to be regarded as the Pope's indubitable right; and it is very easy to see that by filling English bishoprics and benefices with their own nominees the Popes established in England a powerful army of supporters of their demands. The ecclesiastics and canon lawyers were the people principally concerned in ecclesiastical causes, and they were the people who would naturally promote appeals to the bishop of Rome. The inconveniences of an imperium in imperio were not, however, slow in manifesting themselves, and many were the attempts of the sovereigns and laity of England to deliver themselves from the incubus of a divided authority. (See 25 Edw. III. St. 4; 38 Edw. III. St. 2; 3 Ric. II. c. 3; 7 Ric. II. c. 12; 13 Ric. II. c. 2; 2 Hen. IV. c. 3; 1 Hen. V. c. 7), but they were met unfortunately by the difficulty that the ecclesiastics were only too ready to play into the hands of the Popes. Thus it came about that the Popes gradually drew to themselves an appellate jurisdiction in English ecclesiastical causes. But in this, as in other matters, the appellate jurisdiction was no inherent part of the law even of the Church, still less of the State, and the State which had permitted it, might with perfect justice also prohibit it, as it did in England, as one of the first steps in the English Reformation: see 24 Hen. VIII. c. 12.

In the development of canon law the Popes also aspired to imitate their imperial predecessors, and in their rescripts and decretals assumed the absolute right of legislation in ecclesiastical affairs formerly exercised by the emperors in temporal affairs.\*

It may, perhaps, be supposed by some that this discussion of the status of Courts Christian is, at all events in

\*The curious custom of carrying the Popes seated in a chair on ceremonial occasions is doubtless a survival of the ancient honours of the curule chair accorded to Roman emperors and other dignitaries, and which entitled them to be carried seated on occasions of ceremony.

Canada, a matter of altogether antiquarian interest, a mere academic question, but it is not so by any means. In the Province of Quebec, where the Roman Catholic part of the Christian Church still exercises such a preponderating influence, the Roman Catholic ecclesiastical courts still assume to have jurisdiction to inquire into the validity of marriages, and even take upon themselves to annul them! Such an assumption of authority, it is needless to say, has really no legal effect and the decree of such courts is a mere *brutum fulmen*, of no legal force or validity whatever, and it has been, in effect, so declared by Mr. Justice Archibald in the recent case of *Delpit v. Côté*, 20 Que. S. C. 338. In that case a sentence had been pronounced by a Roman Catholic ecclesiastical court at Quebec, purporting to annul a marriage, and this sentence had actually been confirmed by His Holiness the Pope, but it was nevertheless declared to be of no legal effect, and the marriage in question was held valid and binding in law. Mr. Justice Archibald has put the legal aspect of the matter on a very sure and solid foundation, and his statement of the law appears to be incontrovertible, and for that reason we make no apology for making the following extract from his judgment on pages 389-390:

"The claim of jurisdiction (i.e., by the Quebec Roman Catholic ecclesiastical courts) must rest, I suppose, on the supposition that the right of the ecclesiastical court to hear matrimonial causes, which existed as an institution under the French régime, has in some way or another survived the change of sovereignty. There can be no ground for such opinion. Though colonists carry with them the laws of their country, they do not carry its courts. Though the laws of a ceded territory may remain under the new sovereignty, neither courts nor officials remain, and the laws can only be put in execution in so far as courts shall be created having jurisdiction. This does [not] need argument. It is a necessary consequence of the maxim that honour and justice flow from the sovereign. So much is this the case that it is only by statutory provision that offices do not become vacant on the demise of the Crown, but are only suspended till proper oaths are taken.

"Then whence the power in the Catholic Church, or any other, to summon parties and solemnly decide as to the validity of the marriage tie between them? No such grant of power has ever been made since the cession.

"An expression of their Lordships in the Guibord case has been cited, purporting that a bishop is *judex ordinarius*, having power to decide upon matters of faith and doctrine, and doubtless this is the case. His authority is founded on the implied contract that the members of the Church agree to submit to the rules of the Church, and to the mode of their execution so long as they remain members, on pain of ecclesiastical penalties, or even excommunication; and in such matters the civil court will not interfere; but it will interfere, and will give a remedy, where the ecclesiastical authority imposes even an ecclesiastical penalty, such as refusal of burial, without warrant, under the rules and laws of the Church. Thus in the Guibord case the court sustained the mandamus ordering the interment of his body in consecrated ground.

"The truth is, all the churches in this country are mere voluntary associations, and they deal with their members by virtue of contract, either express or implied. In this they are not different from other voluntary associations. Persons, when they become members, bind themselves to abide by the laws of the association, and they recognize the authority of the officers as provided by the laws. But there is no kind of coercive jurisdiction existing in any of them."

This puts the matter quite plainly and simply. Courts Christian now stand in Canada on no better foundation than courts instituted by any voluntary society; a court of Odd Fellows has just as much jurisdiction over its members as a Court Christian. Within certain limits it can impose penalties and deprive members of the privileges of the society, but it has no other coercive jurisdiction of any kind, and as long as it faithfully carries out the rules and regulations of the society, the temporal courts will not interfere, but the temporal courts will interfere with the decisions of such courts, if, under pretence of carrying out the rules of the

society, they deprive their members of temporal rights to which by those rules they are entitled; as for merely spiritual rights, of which members are unjustly deprived by ecclesiastical sentences, there appears to be no legal remedy, unless the temporal court can see that the unjust deprivation of spiritual rights is also the occasion of some temporal wrong, and in that case perhaps a legal remedy might be found, but probably only in the nature of damages for the temporal injury.

Several instances may be adduced of this exercise of the jurisdiction of the temporal courts to review, and, if need be in the interest of justice, to override the decisions of ecclesiastical courts. One of the most hotly contested was that of *Brown v. Curé of Montreal*, L. R. 6 P. C. 157, (the well known Guibord case) in which the right of a deceased parishioner to interment in consecrated ground was maintained in spite of the decision of an ecclesiastical court refusing it. In *Dean v. Bennett*, L. R. 9 Eq. 625, the dismissal of an Independent minister by a Church court was held invalid as not having been effected according to the law of the Church. Where rights to ecclesiastical property are concerned, the temporal courts will determine the rights of conflicting claimants: see *Attorney-General v. Christie*, 13 Gr. 495; *Attorney-General v. Jeffrey*, 10 Gr. 273; *Attorney-General v. Anderson*, 58 L. T. 726; *Dorland v. Jones*, 7 O. R. 17, 12 A. R. 543, 14 S. C. R. 39; *Itter v. Howe*, 23 A. R. 256; *Brewster v. Hendershott*, 27 A. R. 232. Where the Church court has properly carried out the rules of the Church, the temporal courts will not interfere: *Ash v. Methodist Church*, 27 A. R. 602. In an Indian appeal to the Judicial Committee of the Privy Council the court was called on to pronounce on certain questions of ritual practised in a Mohamedan mosque. The action was brought by the Imam of a mosque to restrain the defendants from interfering with the plaintiff's right to conduct its service; and also to restrain the defendants from carrying on prayers therein under the guidance of an Imam appointed by themselves. It appeared that the points in dispute were whether the plaintiff was entitled to introduce two observances to



which the defendants objected: (1) a loud, instead of a low-toned, Amen; and (2) the performance of a ceremony entitled the Rajadam, which consisted in a ceremonial gesture of raising the hands to the ears at a particular point of the service. The Judicial Committee, after duly considering the laws of the sect to which the parties belonged, determined that the observances in question were not illegal, and that the plaintiff in introducing the observances into a mosque where they had not been previously used, was not violating the law or usage of the sect, and gave judgment in favour of the plaintiff: *Fuzul Karim v. Haji Mowla Buksh*, 18 Ind. App. 59. The committee dealt with this case in the same way they would deal with a case involving the decrees of a Court Christian.

GEO. S. HOLMESTED.

Toronto.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Accident Insurance.**]—*Fenton v. Thorley and Co.*, 19 T. L. R. 684, decides that rupture caused by a sudden effort to turn a wheel which had stuck, is the result of "accident" within the meaning of the Workmen's Compensation Act, 1897. "Personal injury" is the expression used in the Ontario Act, but the decision and the definition of "accident" as "an unlooked-for mishap or occurrence or an untoward event which is not expected or designed," may be of use in insurance cases.

**Carriers.**]—The judgment in *Upperton v. Union-Castle Mail Steamship Co.*, 19 T. L. R. 123, holding the carriers liable for negligence in storing luggage, was affirmed by the Court of Appeal: 19 T. L. R. 687.

**Company.**]—The judgment of Lord Alverstone, C.J., in *Mayor of Sheffield v. Barclay*, 19 T. L. R. 2, as to a forged transfer of shares, noted ante p. 19, has been reversed by the Court of Appeal: 19 T. L. R. 714. That Court approves of the dicta of Lindley, J., in *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188, at p. 195, which Lord Alverstone did not feel inclined to follow. The result of the judgment is that in the case of a forged transfer of shares the person innocently and without negligence getting the benefit of it is not liable to indemnify the company when the company is subsequently called upon to make good the loss to the true owner.—In *Dickinson v. Holt*, 19 T. L. R. 667, an attempt to change preference shares of one pound each into two ordinary shares of ten shillings each, was held to be more than to "alter or affect the rights and privileges of the holders for the time being of (such) shares," within the meaning of

\* Including the cases to the end of Vol. 19.

the trust deed under which the preference shares had been created.—In *Pulsford v. Devenish*, 19 T. L. R. 688, a liquidator who knew of a claim and did not pay it, although assets were available, was, after the company had been wound up and the assets distributed, held personally liable to the creditor, who had not been aware of the proceedings; the case, in principle, resembling *Carling Brewing and Malting Co. v. Black*, 6 O. R. 441.

**Contract.]**—In their judgments in *Krell v. Henry*, 19 T. L. R. 711, dismissing the appeal from the judgment below, 18 T. L. R. 823, noted 22 C. L. T. 362, the Lord Justices in the Court of Appeal deal exhaustively with the difficult question of impossibility of performance of a contract. Destruction of the actual subject matter is, it is settled by *Taylor v. Caldwell*, 3 B. & S. 826, an excuse for non-performance, and a supervening impossibility of user of the subject matter in the manner contemplated by both parties, though without its actual destruction, is in this case held to be also a sufficient excuse.—*Herne Bay Steamboat Co. v. Hutton*, 19 T. L. R. 680, is another “coronation” case, where the opposite result was arrived at, the contention that the contract was dependent on the happening of the Naval Review not being made out in fact.—The judgment of the Court of Appeal in *Tolhurst v. Associated Portland Manufacturers*, 18 T. L. R. 827, noted 22 C. L. T. 362, that a contract by a landowner to supply chalk at a certain price to a company was assignable by that company to a new amalgamating company, was affirmed by the House of Lords: 19 T. L. R. 677.

**Infant.]**—*Stephens v. Dudbridge Ironworks Co.*, 19 T. L. R. 665, while to some extent depending upon the provisions of the Workmen’s Compensation Act, is of general value as a warning of the danger of dealing with a person assuming, without legal authority, to act for an infant. The infant in question was injured while in the defendants’ employment. A claim for compensation under the Act was made on his behalf by a person in loco parentis to him, assuming to act as his guardian, and this claim was acceded to without arbitration or action, and the

maximum allowance under the Act paid from time to time to the infant, who gave a formal receipt for the money as being for the statutory allowance. The Act provides that a workman may claim compensation under the Act or take the same proceedings as were open to him before the commencement of the Act. This action was afterwards brought for damages by the infant suing by his legally appointed guardian and next friend. It was held that even if there had been an election to proceed under the Act—which was thought doubtful—the infant was not bound, for such an election would not have been for his benefit.

**Limitation of Actions.]**—A letter by the debtor to the creditor referring in general terms to an existing indebtedness, stating that the debtor's prospects are improving, and adding "so that I shall be able to repay you," was held in *Whitcombe v. Steere*, 19 T. L. R. 697, to be a sufficient acknowledgment and not a mere expression of a hope to pay.

**Patent.]**—The Judicial Committee in affirming in *Consolidated Car Heating Co. v. Came*, 19 T. L. R. 692, the judgment of the Court of King's Bench of Quebec, point out that in a contest between rival patentees the question of infringement is one of fact to be decided not merely by comparison of the respective specifications, but by regard to the existing state of knowledge as to the invention in question, and to the actual working of the machines in question. A subsequent inventor may take the benefit of many of the ideas of the prior inventor, and yet if he add some essential element previously wanting so as to make the new machine a distinct improvement on the old one, he is not an infringer.

**Prescription.]**—*Kilgour v. Gaddes*, 19 T. L. R. 697, deals with the different effect of user of a right of way for twenty years and for forty years. The plaintiff and the defendant were lessees under the same lessor, and the defendant and his predecessors in title had, as the jury found, enjoyed for more than forty years the right to cross part of the plaintiff's leasehold premises and draw water from a well thereon. It was held that by this user a right had been acquired. Twenty years' enjoyment of the right would not have been sufficient,

however, for in that case the *prima facie* prescriptive right would have been displaced by shewing the paramount title of the lessor.

**Receiver.]**—In *re Marquis of Anglesey, De Galve v. Gardner*, 19 T. L. R. 719, is a case shewing the advantages of obtaining a receivership order where it is possible to take that step. An incumbrancer of the interest of a residuary legatee in an estate obtained a receivership order by way of equitable execution, and gave notice to the executor. Subsequently the legatee took proceedings for administration, and the proceeds of the estate were paid into Court. Other incumbrancers of the legatee's interest then obtained stop orders and charging orders. It was held that the incumbrancer who had obtained the receivership order was entitled to priority.

**Solicitor.]**—*Tendring Hundred Waterworks Co. v. Jones*, 19 T. L. R. 720, deals with the practical question of the extent of a solicitor's liability for the misdeeds of his partner. The defendant entered into partnership with a solicitor who was also secretary of the plaintiff company, the articles of partnership providing that the income from the appointment should form part of the partnership receipts. Subsequently the firm as solicitors for the company carried on negotiations for the purchase of a piece of property, and, as the company did not wish to appear in the matter, an agreement for purchase was entered into by the secretary personally, and pursuant to a resolution to that effect he had the conveyance made to himself personally, the defendant not being aware of this. Subsequently he mortgaged the property for its full value and used the money. It was held that the defendant was not liable, the contention that there was an implied duty on the part of the firm (and therefore a firm liability) to see that the clients were protected by a conveyance in such a form as would have rendered the fraud impossible, being negatived.

**Trade Union.]**—*Glamorgan Coal Co. v. South Wales Miners' Federation*, 19 T. L. R. 701, and *Giblan v. National*

Amalgamated Labourers' Union, 19 T. L. R. 708, are trade union cases in which the Court of Appeal, reversing the judgments below — reported respectively 18 T. L. R. 810, and 18 T. L. R. 500, and noted respectively 22 C. L. T. 364, and 22 C. L. T. 214—carry the liability of trade unions a long way. In the first case Vaughan Williams, L.J., dissented, but the majority of the Court [Romer and Mathew, L.JJ.] held that the defendants were liable in damages where under their instructions the plaintiffs' workmen left the plaintiffs' employment without notice, the instructions having, it was shewn, been given in good faith for the supposed benefit of the workmen, and not with the intention of injuring the plaintiffs. In the second case the Court [Vaughan Williams, Romer, and Stirling, L.JJ.] unanimously held that the plaintiff had by the action of the officers of the trade union been without just cause interfered with "in the exercise of his undoubted common law right to dispose of his labour according to his will," and that the trade union was liable.

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## EDITORIAL REVIEW.

**Mr. Ewart on the Independence of the Bench.**

We republish, in connection with the article of Mr. John S. Ewart, K.C., ante, intituled "Jobs for Judges," the remarks made by Mr. Ewart on the 8th September last at Winnipeg, in congratulating Mr. Justice Perdue on his elevation to the Bench:—

"My Lord, supplementing the welcome already given to your Lordship in Chambers, may I be permitted now, as for the first time you appear in Court, to extend to your Lordship, on behalf of the Bar, their congratulations upon your elevation to the Bench of this Province?

"Your Lordship will recognize that an attempt to supply the place rendered vacant by the elevation of Chief Justice Killam to the Supreme Court of Canada is a task of no ordinary difficulty, and I can place no higher or more truthful estimate upon the value of your services as a Manitoban Judge, and at the same time better express my hope for your Lordship's success, than to say that I could wish that you should be in all things, save one, such as he was. Justice Killam possesses in a very rare degree the qualifications and equipment of an excellent Judge, and it is with the very greatest of personal regret that I see coming to an end the frequent recurrences of the pleasure which I enjoyed in arguing cases before him; and yet, my Lord, I would not have you accept employment and emolument outside that attached to your office.

"I am firmly convinced that the recent Governmental practice of giving jobs to Judges is subversive of the usefulness of the Bench. It is destructive of the popular belief in its impartiality and its integrity.

"My Lord, courts of justice stand between society and anarchy. Their strength lies in the security which they give to property and rights and in the satisfaction felt by the

people in their administration of justice. It is the duty, therefore, of every good citizen, and, perhaps, especially the duty of members of the Bar, to endeavour to maintain the existence of such conditions as will protect the Bench from the approach of influences which are injurious to it.

"My Lord, who can contemplate with equanimity or patience the present position of the judicial office in Ontario? I do not believe that it is well for the Bench that it should be shielded from all criticism, but I do think such criticism is a misfortune, and that the habit of mind which seeks explanation for decisions in personal bias of the Judges is one of the most deplorable mental attitudes which can take possession of society.

"My Lord, the result of the Gamey investigation, if Mr. Stratton was to be acquitted, was easily foreseen, namely, that two of the very best and purest minded of the Ontario Judges are believed by probably scores of thousands of people to have been influenced by circumstances not found in the evidence. Those who know these Judges, as I know them, have no such thought, or, if the language of the judgment is calculated for a moment to raise the idea, we can easily put it aside. But we must not wonder that the general public, and particularly strong Conservatives, are not too generous, and that these Judges have been attacked and condemned not only in the press, but in the Legislature and upon public platforms. To a lover of his profession this is, I say, insuspicious and disquieting.

"In Dawson City, at the present moment, a Judge, who, till yesterday, was a strong political partisan, is inquiring into matters in controversy between the political parties. And can we be surprised that his rulings are being telegraphed to the Opposition at Ottawa to be there discussed and denounced? While Mr. Justice Britton's regular salary runs at the usual rate, he is presented by his political friends with the finest holiday trip that the continent can afford, and a bonus of \$2,000. His judicial usefulness in every case of political complexion is forever gone. Henceforward every decision adverse to the Conservative party will evoke memories of the Treadgold Commission.



“My Lord, the habit of attributing decisions to improper influences is easily acquired, and had already become so familiar that an attack upon Mr. Justice Maclellan (as righteous a Judge as ever sat upon a bench), because of his action in some interlocutory application, passes almost unnoticed. Mr. Justice Killam, too, has been traduced in unmeasured language by the press, and little more heed is given to the incident than if he were a politician. Process for contempt has lately become almost impossible, for the reason, unfortunately, that too many people would be involved.

“My Lord, now that you are Mr. Justice Perdue, you will be approached by the railway companies, and will be offered free transportation over their lines of railway. It is my belief that you will refuse all such degrading offers. If it be asked whether I think that Government jobs and railway passes influence Judges, I reply that human nature is weak; that motive and mental influence work subtly, and their operations are much more easily discerned by onlookers than by the one affected; that such things usually do produce a frame of mind favourable to the donors, and that I myself, with all my innate and trained respect (reverence, I would almost say) for the Bench, cannot sometimes restrain the thought that elevation to the Bench is not equivalent to inoculation against the feelings of gratitude for past favours or pleasing anticipation of those to come.

“My Lord, it is a fact of some sinister significance that the political parties, the Governments and their oppositions, have in these latter days become the most frequent of litigants; and that the practice which I am venturing to condemn has grown up and expanded synchronously with the development of that condition. My Lord, I see no justification for the employment of Judges in matters outside their office, and not covered by their salaries, in the assertion that it is the Governments of the day that are the employers and the paymasters. The ‘Government of the day’ is but an euphemistic alternative for the name of some political party. If employment is accepted from Mr. Sifton and Mr. Roblin, why not from Mr. Borden and Mr. Greenway? If from the Government of the day, whose members are deeply interested in much

litigation, why not from the Canadian Pacific Railway or the Hudson's Bay Company?

"Would it be sufficient reply to such employment to say that the Judges were too pure and too little human to be affected by such engagements, and if, my Lord, Judges may accept free transportation from the railway companies and be unaffected, why may they not also accept a cask of wine from Mr. Galt, a bale of silk from Mr. Stobart, or a bag of flour from the Ogilvie Milling Company?

"My Lord, I hesitated long before deciding to say publicly what I have now addressed to your lordship, and I have awaited for its utterance some public opportunity which might possibly attract to my words that notice which my private position would not of itself insure. I am persuaded, too, that by the Judges my words, although probably thought unnecessary, or even ill-judged, will be accepted as the true belief of one who, I can assure them, by no means stands alone in the apprehension with which he contemplates the present popular attitude towards the judiciary of his country. My Lord, the Bar and the public wish you every success in the discharge of those duties to which they believe you will bring not merely the advantages of long experience, and a conscientious desire to do justly, but, maintaining the high traditions of the British Bench, a determination to avoid those things which are tending toward its debasement."

Judge Perdue, in reply, after thanking Mr. Ewart and the Bar for their congratulations, and asking for their forbearance and assistance in his duties, went on to say:—

"I agree with much you have said, Mr. Ewart, as to the duties of Judges. Of course, I am too newly-appointed to say much about these duties; remarks of that nature would come more properly from a more experienced Judge; but I think I might go this far and say that I agree that a Judge should avoid as far as possible being involved in any inquiry or any commission which would mix him up in any political controversy, and that he should not accept from any party or from any person or corporation that may possibly at some time be a suitor before him any favour or consideration which might have the appearance of influencing his mind.

"In regard to what you have said with respect to Mr. Justice Killam presiding over a certain commission, I must say that I cannot agree with you in that. The commission to which you refer was for the revision of the statutes of Manitoba, a most important work, in which the Bar and the public were all interested, deeply interested, and I know of no one who could preside over such a commission in a better manner than so able and so experienced a jurist. A Judge's leisure time belongs to himself, and if Mr. Justice Killam, in his leisure time, performed duties in presiding over that commission revising the statutes, I do not see, myself, anything wrong in the Government remunerating him for giving up his leisure time to the public service. Besides, there are precedents for it in England. My recollection is that Judges have presided over these commissions there, and I have not heard of any objection being taken to that course. With regard to Judges being influenced by receiving any such work, I do not see that they are likely to be influenced by that as coming from any political party. We must bear in mind the fact that Judges are appointed by Governments, and these bodies always belong to one particular political party or the other, and I think it would scarcely be said that a Judge appointed by the Government of the day must necessarily be bound by feelings of gratitude towards that party, so that his judgment will be biassed; I trust that is not the case.

"I thank you very much again for your congratulations, and will promise you this, that I will give the subject matter of your remarks my most careful consideration, and always bear it in mind."

The importance of Mr. Ewart's statements in his address and in his article cannot be exaggerated. When those statements are carefully read and pondered, it will be found that they do not contain personal attacks upon the Judges, but that where a particular Judge's name is introduced it is to serve as an example or illustration. Members of the Bar have confidence in the integrity and impartiality of the Judges, and do not believe that they are actually biassed by their selection as the recipients of favours from the Governments of the day. The suggestion of a possibility of bias is quite suffi-

cient to destroy respect for the Bench and interfere with the public acceptance of judicial decisions, which is really what gives them force and effect. Mr. Ewart has displayed independence and courage in dealing boldly with a very delicate subject. Possibly no one else in Canada would have ventured so far. Many leaders of the Bar would have said it was none of their business. But we venture to think that not only the leaders, but the rank and file of the Bar, will agree with Mr. Ewart's conclusions. We cannot be too careful of the honour and independence of the Bench.

**Sir Frederick Pollock at Osgoode Hall.**

On Monday the 21st September last Sir Frederick Pollock, the distinguished English jurist and scholar, delivered a lecture at Osgoode Hall on "The Common Law and the Foundations of Justice." The lecture was the first of a series to be given in the different law schools of this continent, and was given under the auspices of the Osgoode Hall Law School. The school not being in session, not many of the students were present, but there was a large attendance of the Toronto Bar, who assembled on the invitation of Dr. N. W. Hoyles, Principal of the Law School. The lecture was extremely interesting and instructive. The following excellent summary is taken from the *Toronto Globe*:—

Sir Frederick regards all modern law as derived from one or other of two origins—the German law and the Roman law—and the English common law is the principal member of the German system. Of the common law and the Roman law the latter is the more ancient, but the former has been the more continuous. The common law has been steadily in force in England even when it was not certain who was King, and when it was certain that there was no King at all, as during the Commonwealth period. He held that the common law was in force in the thirteenth century, when there were then no permanent Judges and no recognizable jury; when stealing cattle might be regarded as the occupation of the people by night, and manslaughter and perjury their recreation by day. If there were no Judges or jury

there was the sheriff discharging his functions in person, and the Grand Jury, which dates back to the Assize of Clarendon.

In tracing the evolution of the common law Sir Frederick took note of four features by which it has been continuously characterized—publicity of procedure, the neutrality of the trial court, the interpretative and legislative functions of the Court, and the absence of privilege on the part of its officials. The necessity of complete publicity has always been recognized, except with regard to certain classes of cases in comparatively recent times. Parties have always been held answerable for the conduct of their own cases in the courts. It is not the function of the Court to give information or to correct mistakes. The procedure resembles a game, and each side is expected to observe the rules. The Judges are not supposed to base their finding on anything except what is brought to their notice during the trial. There is an appearance of departure from neutrality in a criminal prosecution, but that is really a suit between the King and the accused, and the function of the Court, as in other suits, is to decide between them on the evidence submitted.

In primitive times the Court had to find its law for itself, and it both made the law and administered it. After the King, with the aid of his Council, began to make laws, and, still more recently, when he made them with the advice of Parliament, the Courts alone were allowed to interpret them. There never was any official adviser to aid them. This finding of their own law when there was no other, and giving their own interpretation of the law when there was one, greatly enhanced the power and dignity of the King's Judges. Their decisions were binding on the parties before them, and also became precedents to bind parties in cases of the future. The consequent uniformity of the law has been well established since the reign of Henry III., owing largely to the practice of sending the Judges on circuit. They knew the law, and no one else anywhere did. The practice established by the Judges of not allowing any officials under them to plead privilege in bar of prosecution for mistakes or wrongful acts has been an important means of protecting human freedom.

Other countries have been seriously hampered by the recognition of such privilege.

Sir Frederick, in conclusion, expressed strongly his opinion that it would be a great mistake to depreciate these features of the common law or to regard them as obsolete. The art of jurisprudence is like the art of war—the nature of the contest remains the same, though methods and devices may change from age to age. The next campaign is for the younger generation of lawyers. He advised them to bear in mind that in serving the law they are serving the Commonwealth, and that their calling is not a trade, but a science. If the writ of King Edward VII. runs throughout the empire it is because King Edward I. was a faithful servant of the people and of the law. The common law is bound up with the destinies of the English-speaking nations.

#### **County Court Judges.**

Mr. J. H. Madden, of Napanee, has been appointed Judge of the County Court of Lennox and Addington, in the room of Judge Wilkison, deceased.

Mr. William Mosgrove, junior Judge of the County Court of Carleton, died on the 31st August last.

#### **County Law Associations.**

On Wednesday the 3rd September representatives from the various county law associations of the Province met at Osgoode Hall to give their annual consideration to matters of interest to the legal profession.

Mr. D. W. Dumble, K.C., Peterborough, was chosen chairman, and Mr. W. C. Mikel, Belleville, secretary.

A number of very important topics were discussed and resolutions favouring the following reforms were passed:—

Extension of the powers of local Judges of the High Court, increase of Judges' salaries, bankruptcy legislation, the establishment of a Divorce Court, improvement of municipal legislation, aid to county libraries from the Dominion Government, simplifying of the Surrogate forms, revising the Surrogate tariff, and also opposing the proposed bill creating a special class of conveyancers.

A legislation committee was appointed, consisting of Messrs. Matthew Wilson, K.C., Chatham; W. Proudfoot, K.C., Goderich; A. H. Clarke, K.C., Windsor; W. A. McLean, Guelph; and W. C. Mikel, Belleville.

Also a special committee was appointed, consisting of Messrs. Wm. Proudfoot, K.C., W. A. McLean, and W. C. Mikel, to wait upon the Attorney-General in reference to the Surrogate forms.

September was chosen as the time for next year's meeting, and the arrangements for the same was left in the hands of Messrs. W. Proudfoot, K.C., Wm. Steers of Lindsay, W. A. McLean, and W. C. Mikel.

#### **Recent American Decisions.**

*Bills and Notes.*—Notice of dishonour of a promissory note is held in *Oakley v. Carr* (Neb.), 60 L. R. A. 431, to be sufficient if sent to the last indorser by the first mail of the day following dishonour, even though such indorser is an agent for collection merely.

A promissory note is held, in *Halsack v. Wolf* (Neb.), 60 L. R. A. 434, not to be rendered non-negotiable by an agreement to pay the sum named "with exchange" at a place other than that at which it is payable.

*Criminal Law.*—The mere separation of jurors impanelled to try a capital case, from their fellows, without the attendance of an officer, although an irregularity, is held, in *Gamble v. State* (Fla.), 60 L. R. A. 547, not to be a sufficient cause for setting aside the verdict if the Court is satisfied that the prisoner has not sustained any injury from such separation.

*Damages.*—Fright, though resulting in physical injury, is held, in *Sanderson v. Northern P. R. Co.* (Minn.), 60 L. R. A. 403, to give no right to recovery of damages, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.

Physical injury or disease resulting from fright or nervous shock caused by negligent acts, where such result might

with reasonable certainty have been anticipated, or the negligence was gross, is held, in *Watkins v. Kaolin Mfg. Co.* (N. C.), 60 L. R. A. 617, to give a right of action for damages.

*Funeral Expenses.*—The allowance of \$455 out of an undertaker's bill for \$526 for the burial of an aged janitor whose companions were labouring men, and whose most intimate friend was a street sweeper, and whose estate was less than \$5,000, is held in *Foley v. Broeksmit* (Ia.), 60 L. R. A. 571, to be excessive.

*Insurance.*—Carrying a loaded gun from one room of a house, in which it had been left by another person, to an adjoining room, is held, in *Doody v. National Masonic Accident Assn.* (Neb.), 60 L. R. A. 424, to be "handling firearms" within the meaning of a clause in an accident insurance policy limiting to \$500 the recovery for any injury received while hunting or while using or handling loaded firearms.

In distributing the loss upon a building, machinery, and stock between insurance policies covering all the items for a gross sum and those specially liable on each item, all of which provided that the liability should not be greater "than the amount hereby insured shall bear to the whole insurance," it is held, in *Schmaelzle v. London & L. Fire Ins. Co.* (Conn.), 60 L. R. A. 536, that the blanket policies should be regarded as insuring each item to the entire amount unappropriated when it is reached, making the adjustment item by item in the order of greatest loss, if that will work substantial equity and justice to all concerned, and deducting the sums appropriated to the respective items as they are adjusted and passed.

After-born children of a subsequent marriage are held, in *Scull v. Aetna Life Ins. Co.* (N. C.), 60 L. R. A. 615, to be entitled to share in the benefit of a policy of life insurance taken for the benefit of the children of the insured.

*Lottery.*—A scheme whereby a common fund is to be produced by the contributions of various parties, and afterwards distributed among the parties contributing thereto, and a valuable preference or privilege in the distribution thereof is made to depend upon chance, is held in *State ex rel. Prout*



v. Nebraska Home Co. (Neb.), 60 L. R. A. 448, to be a lottery.

*Street Railways.*—The attempt of a street railway company to operate its cars during a strike of its employees is held, in *Fewings v. Mendenhall* (Minn.), 60 L. R. A. 601, not to be negligence, so as to make it liable for an injury to a passenger struck by a stone thrown from the street into a car by a strike sympathizer in no way under the control or direction of the company.

*Sunday.*—Forbidding a barber to exercise his trade on Sunday is held, in *State v. Sopher* (Utah), 60 L. R. A. 468, to be a proper exercise of the police power, and not to restrain him unconstitutionally of personal liberty or deprive him of liberty or property without due process of law.

The hearing of charges against a member of a benefit society and expelling him from membership because of violation of the rules, are held, in *Pepin v. Societe St. Jean Baptiste* (R. I.), 60 L. R. A. 626, not to be a judicial proceeding within the rule which forbids such proceedings on Sunday.

Whether the pumping of an oil well on Sunday is a work of necessity within the meaning of a Sunday law is held, in *State v. McBee* (W. Va.), 60 L. R. A. 638, to be a question for the jury, where the evidence is conflicting as to the injury which will be caused by not pumping it.

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## BOOK NOTICE.

**Solomon's Manual for Colonial Commissioners.**—A new Manual on Colonial Commissions for oaths, affidavits, and proofs in the United Kingdom for record in British Colonies and India, and the fees thereon, with a chapter on commissionerships of deeds in England for American States, appendices of practical forms, and lists of commissioners extracted from the register of the Law Society and other sources: by George Eugene Solomon, solicitor, England. London: Sweet and Maxwell, Limited: 1903.

A useful little book, carefully compiled, and well printed.

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# THE CANADIAN LAW TIMES.

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NOVEMBER, 1903.

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THE STATUTES OF ONTARIO, 1903, 3 EDW. VII.

**T**HIS bulky volume was very late in coming to the hands of the profession. It should be possible, with due diligence, to have the statutes distributed earlier than the beginning of October, even when the session has been so protracted as the last. The more salient points of the legislation will be discussed briefly in the following pages, the preparation of which has been somewhat hastened in order to let the profession have them in their hands before the next session produces its avalanche of amendments.

Chapter 7, "An Act to amend the Statute Law," might well have as its motto, "*De omnibus rebus et quibusdam aliis.*" so diverse are the subjects and statutes referred to in its 63 sections. It is, perhaps, easier to criticize than to suggest a remedy; but this style of legislation is very embarrassing not only to the practising lawyer but to the general public, which by an amusing fiction is supposed to be acquainted with all legislation at its peril.

Section 2 does away with the necessity for proclamations whenever a legal holiday falls on a Sunday.

In future the next following day is to be observed and kept as a legal holiday throughout Ontario "under the same name."

Section 3 is a provision whereby greater publicity and accessibility may be given to the voters' list prepared under R. S. O. c. 7. A copy is to be transmitted to the registrar

of deeds of the registration division in which the municipality is situate, in addition to the officials mentioned in s. 8 of that statute.

Section 4 by repealing s.-s. 2 of s. 169 of the Ontario Election Act (R. S. O. c. 9) closes a controversy which troubled the Courts during the criminal proceedings which arose out of the recent Referendum.

A number of persons were charged before the police magistrates of Toronto and Kingston with personation under R. S. O. c. 10, s. 2, made a part of the Ontario Liquor Act, 1902. It was contended that "the punishment or penalty imposed by law" referred to in s. 2 was to be found in ss. 169, s.-s. 2, and 167 of the Election Act, the latter as amended in 1900, and that the police magistrate could impose either penalty in his discretion, and in fact both magistrates imposed a penalty of \$50 and costs under 169 instead of the larger penalty under 167.

As the penalty under the amended section involved imprisonment as well as a fine, these decisions were not satisfactory to the prosecution, which contended that the magistrate had no option, but was bound to impose the severer punishment under the amended section.

Accordingly, in one of the cases, *Re Denison, Rex v. Case*, proceedings were taken by way of mandamus to compel the police magistrate of Toronto to impose the penalty contained in s. 167 as amended.

It was held by Britton, J., that, the police magistrate having exercised his jurisdiction, he could not interfere even if the magistrate had erred, concerning which he expressed no opinion (2 O. W. R. 152).

In appeal from Britton, J., a Divisional Court held that the complainant, a person other than the person who laid the information before the deputy returning officer, had no locus standi, and dismissed the appeal without deciding whether the magistrate was right or wrong (2 O. W. R. 512).

The repeal of the sub-section ends the discussion.

Section 5. The Court of Appeal in the *Lennox and South Oxford Election Cases* (2 O. W. R. 190, 196), held that

there was no right of appeal where the trial Judges had disagreed in respect of a charge of corrupt practices under the Ontario Election Act (R. S. O. c. 9, s. 171). This section is now amended by adding a sub-section providing that where the trial Judges disagree as to such a charge, there may be an appeal to the Court of Appeal, which may declare the election void, but shall not in such case disqualify the candidate.

Section 6 would look like a provision to meet some "single instance" of hardship to an individual; it provides that a person "holding any temporary employment in the service of the Dominion of Canada requiring professional skill" shall not be disqualified from holding a seat in the Ontario Legislature.

The words are extremely vague; it would have been better to have left the general rule intact.

Section 16 by repealing s. 8 of the Arbitration Act (R. S. O. c. 62, s. 8) and substituting a new section, removes what was described by Lord Justice Lindley (*Re Smith*, 25 Q. B. D. p. 552) as a "blot in the Act," and closes a series of cases in our Courts of which *Excelsior Life Insurance Co. v. Employers' Liability Assurance Corporation* (5 O. L. R. 609) is the latest.

Section 8 gave power to parties, where a submission provided that a reference should be to two arbitrators, to supply vacancies where an appointed arbitrator refused to act, or was incapable of acting, or died. It also provided that on failure by one party to appoint an arbitrator the other party might appoint a sole arbitrator whose award should be binding.

This latter provision has given rise to much litigation; the crux being as to the meaning of the words "two arbitrators, one to be appointed by each party," and as to whether they covered a submission providing for a reference to three arbitrators as distinguished from two arbitrators and an umpire, so as to allow of the appointment of a sole arbitrator by the one party upon the default of the other.

In the *Excelsior* case the reference was to the "arbitration of two disinterested persons, one to be chosen by each

party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be final."

There was considerable conflict of judicial opinion on the point, but the Court of Appeal held that the submission was not "the statutory submission to two arbitrators," and an appointment by one party of a sole arbitrator was set aside.

The substituted section expressly covers the case of a reference to three arbitrators, "one to be appointed by each party and the third by such two arbitrators or by any other person," and provides for the case of default either in making an original appointment, or in supplying a vacancy. The very stringent provision in the repealed section whereby the one party was allowed to name a sole arbitrator is not re-enacted. An application has to be made to the Court or a Judge, which may either make the appointment or allow to the defaulting party a *locus poenitentiae*; provision is made for the appointment by the Court of a new third arbitrator on application being made for that purpose.

Section 17 has for its object to enlarge the rights of creditors to reach the effects of debtors.

It amends the new s. 10 of the Execution Act brought in by 62 V. (2) c. 7, s. 9, by providing that all rights under letters patent may be seized and sold under execution.

This amendment is open to misconstruction; it is put into a section dealing with the case of shares and dividends of banks and companies, and might, by the careless reader, be taken to refer to rights of a similar character, e.g., under letters of incorporation. No doubt, however, what is aimed at is rights under patents of invention; the interests of a patentee, often very valuable, would seem not to have been exigible under the previous law.

Section 18, s.-s. (1), amends s.-s. (1) of the new s. 17 of the Execution Act, as brought in by 62 V. (2) c. 7, s. 9. After the word "chattels" must in future be read the words "or personal property." The effect of this is to make the section more general, the words "personal property" being more comprehensive than "goods and chattels."

Does this amendment cover patent rights? if so, the previous section would seem unnecessary; if not, why was not the Execution Act extended to cover the case of rights under trade marks, held in *Gegg v. Bassett*, 3 O. L. R. 263, not to be exigible under execution?

By s.-s. 2 of s. 18 an important amendment has been made; the purchaser of an equity of redemption in any personal property attached, seized, or sold under the new sections 10 and 17 of the Execution Act is not to be "personally liable to pay or satisfy any mortgage or other incumbrance upon or affecting the goods, chattels, or personal property."

Was such a person "personally liable" before this amendment? There does not seem to be any authority looking in that direction.

The amendment would seem to result from not noticing the difference between s. 32, relating to the sale of an equity of redemption in realty, and s. 17 (now being amended) relating to chattels.

Under the former clause a liability is imposed upon the purchaser which did not, it is submitted, exist when mortgaged chattels were purchased.

Section 19. By R. S. O. c. 87. s. 36, police magistrates, their partners or clerks, are prohibited from acting in criminal cases as agent, solicitor, or counsel. The present section relaxes this rule, and exempts from its wholesome operation the case of a "deputy or second police magistrate," who may therefore practise in such cases.

This is perhaps necessary in view of the meagre stipend given to such officials, but the stricter rule is better in the interests of justice. A police magistrate who appears one day for a client in a criminal case, and on the following day has to hear a criminal charge against him, may, no doubt, be quite free from bias, but it will be difficult to convince the "man in the street" of this fact.

Section 20. Under s. 7 of the Ontario Summary Convictions Act, an appeal might be had to the General Sessions from convictions; by the amendment an appeal is given where no conviction has been made, but the information or complaint has been dismissed.

Section 21 expedites the procedure upon appeals to the Sessions. The appeal, unless specially ordered by the chairman of the Sessions upon the application of either party, must be heard by the chairman without a jury, and power is given to the chairman to hold a special sitting of the Court to hear an appeal, where there is to be no jury.

"Enterprises of great weight and moment" need not in future have to wait for the regular sittings in June or December.

Section 22 relates mainly to coroners in the city of Toronto; it provides for the appointment of one who is to be designated "the coroner for the city of Toronto;" all other coroners in Toronto are to have the powers of associate coroners; the duties of all the coroners are to be fixed by order in council.

The effect of this is to distribute work among the different officials and to prevent any unseemly effort on the part of competing coroners to secure the holding of an inquest. Where death is occasioned by an accident occurring upon a street or highway in Toronto by reason of the operation of a railway or tramway, the directions for an inquest must be given by the County Crown Attorney.

Section 23. An act of justice to County Crown Attorneys, who have heretofore performed much work for which no remuneration was provided. This section gives them a right to the fees mentioned in the schedule to R. S. O. c. 101.

Section 24. Under R. S. O. c. 105, s. 3, Crown witnesses may in certain cases be compensated for their attendance on a prosecution or trial. The section (3) does not provide for any distinction between expert and ordinary witnesses. This amendment will permit a larger allowance to be made to expert than to ordinary witnesses.

Section 25 should be noted by trustees, as it disables them from investing trust funds in the stock of any society or company incorporated under Revised Statutes 164 and 169 which has not a "capitalized, fixed, paid up, and permanent stock not liable to be withdrawn therefrom amounting to at least" \$200,000, instead of \$100,000 as formerly.



Section 26 extends to trustees appointed "by an order of any Court" the benefit of the useful provision contained in s. 18 of c. 17, 1900, by which a trustee appointed by writing was enabled to file his accounts in the Surrogate Court of the county in which he is resident, and to have his accounts passed by that Court.

Section 27. The general rule as to costs of a solicitor-trustee is that he is not entitled to charge the estate with any professional services; to allow this would be to violate the rule that a trustee is not to be placed in a position where his duty and his interest conflict. An exception to this has been established where the solicitor-trustee brings or defends proceedings in Court for himself and his co-trustee; he is then entitled to recover profit costs and to charge such costs to the estate.

It was held in *Re Williams* (4 O. L. R. 501) that this exception was not to be extended to proceedings or professional services rendered to the estate out of Court.

This section provides that where "necessary professional services" have been rendered to the estate, regard may be had to them in fixing the amount of compensation under s. 43 of the Trustee Act (R. S. O. c. 129). This in effect gets around the restriction pointed out in the above case.

Section 29 provides that assignments for the general benefit of creditors under R. S. O. c. 147 shall take precedence not merely of attachments, judgments, and executions, as provided by s. 11 of that statute now being amended, but also of garnishee orders and of orders appointing receivers by way of equitable execution.

Section 30. This section applies to affidavits of bona fides or for the purposes of renewal of a chattel mortgage made to a company, and specifically names the president, vice-president, manager, assistant manager, secretary, or treasurer, as officers who, *virtute officii*, may make such affidavits; and also enacts that the same may be made by any other officer or agent of such company "duly authorized by resolution of the directors in that behalf."

This amendment removes doubts which had arisen as to whether the officers named required some special authority to make the affidavit, and also as to the form of the authority required. Agents, if properly authorized, may make the affidavit. Under the former law it was sufficient that the affidavit should shew that the agent or officer was "aware of all the circumstances connected with the sale or mortgage." Under the present amendment he must state that he "has personal knowledge of the facts deposed to."

Section 31 allows an order to be made in the Surrogate Court for the appointment of a guardian to an infant even where the infant is not entitled to any property; thus giving the Surrogate Court the same jurisdiction in such cases as the High Court has.

Section 33 makes it possible, in the case of a commission granted to a notary who is not a barrister or solicitor, to restrict the territory and the cases in which he may exercise his powers. It is difficult to see what advantage this is.

Section 34 deals with the cancellation of preference stock of a company by the directors, and requires the "consent of the subscribers thereto, or holders thereof." Under the former section it was sufficient to obtain the "consent of the holders."

Section 35 sanctions the constitution of an executive committee in the case of companies having more than six directors.

The shareholders may pass a by-law authorizing the directors to delegate their powers to an executive committee of not less than three to be elected by the directors from their number.

This will, doubtless, often prove a great convenience in the management of the business of companies.

Section 36 ought to swell the revenues of the Government, and would seem prompted by the experience of the State of New Jersey in regard to "Trusts."

Under s. 2 of the Ontario Mining Companies Incorporation Act (R. S. O. c. 197) mining companies could only be incorporated for the purpose of carrying on business "within the Province of Ontario."

This restriction is struck out by the amending section; there will in future be no limitation as to the area within which such companies may carry on business.

Section 37 makes an important change in the rights of railway companies affected by the Ontario Railway Act (R. S. O. c. 207).

Under s. 21 of the Act the companies were not entitled to mines and minerals under any land purchased by them; unless where expressly purchased, these were to be deemed as excepted out of the conveyance of such land. This is now repealed. Why?

Section 38 is to remove a scandal caused by some so-called benevolent societies, incorporated under the Benevolent Institutions Act, which have, it is stated, been simply used for the maintenance of gambling resorts. The amendment permits the Lieutenant-Governor in Council to suspend or revoke the corporate powers of any such company which is "reputed to be maintaining or using a place for any gambling or unlawful gaming purposes."

Section 39 deals with the case of a proposed amalgamation of a loan or insurance corporation with another company. Under s. 40 of the Loan Corporations Act (R. S. O. c. 205) power is given in such a case to sell or transfer the assets to a purchasing company. But under the Loan Corporations Act such transactions are exposed to rigid scrutiny before being allowed to go through, and require the consent of the Lieutenant-Governor in Council.

It has been found that in order to avoid this scrutiny, the plan of a voluntary winding-up under the Joint Stock Companies Winding-up Act (R. S. O. c. 222) was resorted to. By s. 13 of that Act the assets might be sold or transferred without any official scrutiny being brought to bear.

Injury might easily be done to shareholders in that way.

This section removes loan corporations within the intent of the Loan Corporations Act, and insurance corporations within the intent of the Ontario Insurance Act, from the scope of the Winding-up Act; they must in future use the machinery provided by their respective Acts for the purpose of any

sale or transfer of assets, and thus be subject to the safeguards prescribed therein.

Section 41 is no doubt the result of the Carnegie gifts, and adds an additional burden to the already overloaded rate-payer.

By s. 14, s.-s. 2, of the Public Libraries Act it is provided that in cities with over 100,000 of a population, the "public library rate" shall not exceed one-quarter of a mill in the dollar; the amendment permits the levy of such "further rate as may be necessary to raise the moneys required to pay the annual interest and sinking fund on moneys to be hereafter borrowed for the purpose of acquiring a site or sites or of purchasing or erecting buildings."

Further amendments looking to the passing of by-laws for the purpose of "acquiring a site" are also made.

Section 43 amends the Act relating to the use of traction engines on highways and exempts engines "used for threshing purposes or for machinery in construction of roadways" from the necessity of contributing towards the strengthening or repairs of bridges or culverts which they may have to use on roads where no tolls are paid.

Section 44 removes a difficulty in regard to limiting the number of licenses in the township of York.

The council of the municipality may pass a by-law for that purpose notwithstanding the division of the municipality into two divisions of East and West York with a separate board of license commissioners for each.

Section 45—a sanitary section—makes provision as to sleeping places in the case of shops, bake houses, or factories, and also as to stables under the same roof as a factory.

Section 46 limits the liability of employers for damages in cases arising by reason of any violation of the Ontario Factories Act (see *Fahey v. Jephcott*, 2 O. L. R. 449).

The limit provided by s. 7 of the Workmen's Act (R. S. O. c. 160, s. 1) is now imposed; the compensation shall not exceed in future the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during these years in the like employment, or the sum of \$1,500, whichever is larger.

Section 49 amends s. 58 of the statute relating to public lunatic asylums. By that section the inspector of prisons and public charities is liable to render an account for his dealings with the estate of a lunatic.

The amending section enacts that in the case of an inmate of an asylum being discharged who is not in the opinion of the inspector capable of managing his own affairs, the inspector having property of the said person in his hands may apply to the Court for direction and relief in regard thereto.

Section 50 extends the provisions of the Trustee Relief Act (R. S. O. c. 33, s. 4) by permitting an order to be made by a Surrogate Judge for payment into Court under that statute, upon the application of any person interested or of the guardian ad litem, in cases where accounts are being passed before him, and it appears that an executor, administrator, guardian, or trustee, has money or securities in his hands belonging to an infant or person of unsound mind or to a beneficiary whose address is unknown.

Section 60 amends the Bills of Sale Act (c. 148, s. 23) by providing that in the case of a mortgage of rolling stock, made by an incorporated company, it shall be a sufficient compliance with the Act if the mortgage and affidavit of bona fides, or copies thereof, be filed in the office of the Provincial Secretary within the time limited for filing chattel mortgages. (Compare c. 13 post.)

The remaining sections of this statute do not seem to call for any comment.

Chapter 8. An Act to amend the Judicature Act.

Sections 3 and 6 deal with the new division of the High Court, the Exchequer Division. Legal opinion, as expressed in the legal journals, does not seem to favour this; this article is probably not the place to discuss the policy of the provision; but it does not seem desirable to introduce a new Court, previously unknown to this country, and thus to accentuate and stereotype distinctions between the divisions of the High Court, which it was supposed from past legislation were to be minimized and, if possible, obliterated.

And why a fourth Chief Justice for the High Court? One is found sufficient in England.

Section 2 repeals an absurd provision of the Judicature Act (s. 4) by which one of the four Judges of the Chancery Division might detach himself from that division, and become a kind of *Judex in partibus*, belonging to no particular division. This has never been acted upon, and now that no fourth Judge, in view of the establishment of another division, will be appointed to the Chancery Division, the section has become useless even as a counsel of perfection.

Section 4 provides for the case of an appeal to the Court of Appeal coming on for hearing before a Court of less than five Judges; the Court may direct the case to be reheard or re-argued before the full Court.

Section 5 amends s. 12 of the Judicature Act in regard to Divisional Courts of the Court of Appeal, and permits that Court to sit in two divisions.

Section 7 provides that in arranging the sittings of Assize a certain number of Judges are to be left free for sittings of the Divisional Court, which it shall be their "duty to hold" during the time that they are left free.

Section 8 will be welcomed by the profession; it requires (by an amendment to s. 70 of the Judicature Act) that every Divisional Court of the High Court shall be composed of three Judges.

Section 9 abolishes the payment of a fee of \$2 on entering an action for trial.

Section 10 makes an important change in practice, and places appeals from the Master in Ordinary upon the same footing as appeals from other Masters; such appeals will in future come before a single Judge in Court, and not before a Divisional Court, as provided by s.-s. 2 of s. 75 of the Judicature Act, which is now repealed.

Section 11 provides that where an action is brought in Ontario on a judgment obtained in Quebec, the costs of the Quebec action shall not be recoverable as of course, but only under a Judge's order, and where, in the opinion of the Judge, the costs were properly incurred, and where the claim might not have been sued in Ontario in the first instance.

This is a beneficial provision as tending to keep down costs and prevent double litigation.

Section 12 amends s. 121 of the Judicature Act, which made it obligatory that all references in the case of proceedings in Toronto should be to the Master in Ordinary; under the section as amended a reference may be made to an "official referee agreed upon by the parties."

Section 13 is to cure the defect pointed out in *Pennington v. Morley*, 3 O. L. R. 514, in which it was held that in a mechanic's lien action under R. S. O. c. 153, the initial proceeding in which is the filing of a statement of claim, there was no authority to allow service out of Ontario of the statement of claim. The word "writ" in R. 162 is to be deemed to include any document by which a matter or proceeding is commenced, and service of any such document "heretofore or hereafter made" will be held to come within that rule.

It must be noted that under chapter 9 the chapter just dealt with is not to come into force until 1st December, 1903, or such earlier day as may be named by proclamation. The reason for this is probably that until an Act providing for the salaries of the additional Judges had been passed by the Dominion Parliament, the provision as to the Exchequer Division could not well take effect, but why postpone on that account the operation of the other sections of the Act?

Chapter 11. Another instance of the tendency to interfere with contractual rights. It might "more properly have been intitled 'an Act to enable Mortgagors to Break their Contracts'" (*John Cartwright, K.C., arguendo* in *Bradburn v. Edinburgh Assurance Co.*, 5 O. L. R. p. 660).

Section 1. The old rule in Equity was that after default a mortgagee was not bound to take his mortgage money without six months' notice, or six months' interest. Then came the Mortgage Act (R. S. O. c. 121) by s. 17 of which it was provided that where default should be made in payment of principal in any mortgage made after the 1st of July, 1888, the mortgagor, in the absence of any express agreement to the contrary, might pay the amount of the mortgage without notice or interest in lieu thereof.

This provision was rather one-sided in the interest solely of mortgagors. This unfairness is done away with by the present section, which relates to mortgages of real estate made after the passing of the Act. Where default is made in payment of principal due under such mortgages, then, "notwithstanding any agreement to the contrary," the mortgagor may pay the principal in arrear upon paying three months' interest thereon or giving three months' notice of his intention to make such payment.

If, having given such notice, he again makes default, he is only entitled to pay up arrears on payment of three months' interest in advance.

Section 2 practically repeals s. 17 of the Mortgage Act, so far as mortgages made subsequently to the passing of this Act are concerned; this is necessary by reason of s. 1.

Section 3 makes generally applicable to mortgages made after 1st July, 1903, the provision contained in R. S. C. c. 127, s. 7, which had previously been applied to loan corporations by R. S. O. c. 205, s. 25. By virtue of this provision, in the case of mortgages for a term of more than five years from the date thereof, any person entitled to redeem may tender the principal money with interest to date and for three months in advance, and no further interest is then chargeable.

For the practical working out of the similar provision in the Dominion Act, see *Bradburn v. Edinburgh Assurance Co.* (supra) and *Re Parker*, 24 O. R. 373.

Chapter 12. The principal point of interest in regard to this statute is that under the provisions of s. 1 the necessity for advertising, which was previously required in all cases in order to bring lands under the Land Titles Act, has been done away with. This was always a very heavy expense, and its abolition will make proceedings under that Act more popular, the initial expense having often deterred owners from availing themselves of the useful provisions of the Act.

The result of s. 1 is to make the defence of a bona fide purchaser for value available for titles under the Act, and as a protection for the assurance fund.



Chapter 13. Section 1 of this Act makes provision as to venue in the case of lien notes, hire receipts, and conditional sales of chattels.

No provision for the trial of any action or proceeding arising out of such transactions at any particular place or elsewhere than in the Court having jurisdiction in the locality where the defendant resides or where the contract is made is to have any effect unless an express notice to that effect is printed in red ink, across the face of such note, hire receipt, or other contract. *Dulmage v. White* (4 O. L. R. 121) will only apply where this has been done.

This section does not take effect until 1st November, 1903.

Section 2 provides that in cases of conditional sales or bailments by incorporated companies to railway companies of rolling stock the contract evidencing the sale or bailment is to be filed in the office of the Provincial Secretary within ten days from the execution thereof, in which case the provisions of s. 1 of the Conditional Sales Act (R. S. O. c. 149) as to having name and address of the manufacturer, etc., painted, etc., thereon shall not apply. (See *Mason v. Lindsay*, 4 O. L. R. p. 265, for a discussion of the effect of s. 1 of R. S. O. c. 149.)

Chapter 15. This "Act to amend the Insurance Act" contains many interesting amendments, and bears witness to the advantage of the supervision of an official such as the present efficient inspector of insurance.

Section 1 provides that every director of a company incorporated under the Insurance Act (R. S. O. c. 203) must during his term of office be the bona fide holder in his own right and to his own use of shares to the capital stock of the company to the extent of at least \$1,000, upon which all calls have been duly paid. Ceasing to be so qualified vacates the office. This is a new and eminently proper safeguard.

Section 2 (1) deprives insurance companies of the right to make voluntary deposits given to them by s. 43 of the principal Act.

The consent of the Minister must in all cases be obtained; it was found undesirable to allow this absolute right to all

companies; it was sometimes used for purposes other than those intended by the Insurance Act.

(2) Difficulties have arisen in regard to the appraisal of losses where the goods in question, though within Ontario at the time of loss or damage, were covered by marine insurance policies effected abroad and in companies not registered in Ontario.

This sub-section allows the insurance registrar to license some individual to act as appraiser and adjuster of such claims; this license will exempt the licensee from the penalties prescribed by s. 85 of the Insurance Act.

Section 3 was probably enacted in order to remove the doubt suggested by *Davies, J.*, in the case of *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (33 S. C. R. 94, at p. 109) as to the rights of mortgagees entitled under the mortgage clause in a policy of insurance against fire to sue in their own name, and without joining the mortgagor.

This point had been considered to have been settled in *Mitchell v. City of London Assurance Co.*, 15 A. R. 262, where the right of the mortgagee to sue was affirmed on the ground that the relation of trustee and cestui que trust had been created between the mortgagee and the owner. Mr. Justice Burton, however, dissented in that case. In view of this state of judicial opinion, it was no doubt wise to enact as is done in this section that a person "entitled as beneficiary, or by assignment or other derivative title, to money payable under a contract of insurance, and possessing at the time of the action brought the right either at law or in equity to receive, and the right to give an effectual discharge to the insurer liable under such contract for such money, shall be at liberty to sue for the same in his own name."

Section 4 enables an insurance company under the Ontario Insurance Act (R. S. O. c. 203) to make a valid payment to a payee or beneficiary domiciled or resident in a foreign jurisdiction, where such payment is valid according to the law of such jurisdiction, and that whether the person

receiving and entitled to receive the money received it in his own right or in a representative character.

This settles doubts which had been suggested as to the power of an insurance company to make a valid payment in such cases.

Section 5. By s. 148 of the Insurance Act as amended by 1 Edw. VII. c. 21, s. 2, all actions against an insurer for recovery of insurance moneys must be brought within one year from the happening of the event insured against, or by leave of the Court within a further term of six months, and may not be commenced after the expiration of that time.

In cases where the assured has not been heard from for seven years and the doctrine of presumption of death has had to be invoked, the defence has been set up that the eighteen months for bringing the action was merged in the seven-year period, and therefore the right of action was gone before it had in fact accrued to anyone by the lapse of the seven years.

This iniquitous defence will be no longer available; by the amending section the eighteen months does not begin to run until the end of the period of seven years.

Section 6. By striking out the word "infant" in the amending section of 1 Edw. VII. c. 21, s. 2 (?), an important change has been made in the rights of creditors and children of an assured person.

Where beneficiaries have been designated by the assured, and one or more predeceased him, he has the right to substitute new beneficiaries. If he failed to do this the statute of Edward provided that the lapsed insurance should go to the "surviving infant children" of the assured, and if no surviving infant children, then it should form part of the estate of the assured, to the possible exclusion of adult children.

This was not considered fair; the insurance is looked at as a settlement for the benefit of the children of the assured: *Re Snyder*, 4 O. L. R. 320. The result of the change now made is that any lapsed shares go to the surviving children, whether infant or adult, and fall into the estate and are avail-

able for creditors or others only if no children survive the assured.

Section 7. This section relates to "preferred beneficiaries" under s. 159 of the Insurance Act.

Under s. 159, s.-s. 8, where a preferred beneficiary died in the lifetime of the assured, the latter might allot the share of the deceased to some other of the class of preferred beneficiaries; in default of such allotment the share of the person so dying had to be for the benefit of the surviving preferred beneficiaries.

This was found to present practical difficulties in working out.

The new clause permits the assured to allot the share of the deceased to any person, whether one of the preferred class or not; in default of allotment the share goes to the surviving preferred beneficiaries, and if no survivor then forms part of the estate of the deceased.

Section 8 relates to friendly societies, and permits them to so amend their constitution and by-laws as to provide for payment of claims of beneficiaries by annual instalments to be completed within ten years from the happening of the event, instead of having to pay at once the gross sum; this privilege will no doubt be a great relief to the societies, but what as to the beneficiaries?

It is to be hoped that the attention of the Legislature will be called to the suggestion of Mr. Justice Osler in *Doidge v. Royal Templars* (4 O. L. R. 423, p. 440): "Speaking for myself, I think the time has arrived when the Legislature should deal practically and summarily with these benevolent and friendly societies, and should provide a clear set of statutory rules as the only ones they shall have the right to impose on those who insure with them. The complicated, ill-expressed, and constantly fluctuating body of rules which they impose on their members are giving rise, as may be seen by the law reports, to very expensive litigation, ruinous in many cases to those who are involved in it."

Chapter 16. Section 1 defines the meaning hereafter to be attached to the phrases "paid up" and "paid in" as used

in the Loan Corporations Act, and removes the confusion which has attached to them.

Section 2. The recent "Atlas" and "Elgin" cases have drawn attention to the evil of permitting loan corporations to invest indiscriminately in "stocks" and "call loans," etc.

For this the Dominion Parliament by its intrusion upon Provincial rights is largely responsible (see 62 & 63 V. c. 41 (D.)).

But, the flood-gates having been opened, all companies desire a chance to make money rapidly, and those incorporated under the Ontario Loan Corporations Act naturally expected some relaxations of the restrictions heretofore imposed on them.

This present section (2) is a carefully prepared clause by which the stringency of the former provision as to investments permitted to such bodies has been somewhat relaxed, while care has been taken to eliminate some of the objectionable and dangerous features of Dominion legislation.

Section 3 deals with the borrowing power of loan corporations. Under the old law (R. S. O. c. 205, s. 29) the actual reserve fund of the corporation was not taken into account in measuring its borrowing power.

This section removes that anomaly.

Section 4, s.-s. 1, provides that on a purchase or sale of assets between corporations, the consideration may be stock in the purchasing corporation, and not necessarily a cash payment, to the shareholders of the vendor corporation.

Sub-section 2 is a necessary consequence of the preceding one; where one object of the new corporation is for the purpose of acquiring the assets of one or more existing corporations, and shares of the new corporation are to be given as the whole or part of the consideration, power is given to the Lieutenant-Governor in Council to dispense with the ordinary provisions as to subscription and payment.

Sub-section 3. Apart from this clause a special meeting had to be held; this enables it to be dispensed with by order-in-council when the consent of the shareholders is clear.

Section 5 enacts that in the case of an amalgamation of trust corporations all trusts of every kind shall pass to the new corporation, and that the new corporation shall ipso facto be substituted for the old one in the case of all unfulfilled probates, administrations, and the like.

Section 6, s.-s. (1), providing that no dividend or bonus shall be paid which has the effect of impairing the paid-in capital of the corporation, is merely declaratory of the present law.

Section 6, s.-s. 2, is no doubt traceable to the case of *Lee v. Canadian Mutual Loan and Investment Co.* (5 O. L. R. 471), a case as to the liability of a mortgagor, who, under the rules of the company from which he was borrowing money, became a shareholder, and was sought to be made liable for losses incurred in the management of the business.

Mr. Justice Osler in that case stated: "It is time that the Legislature took notice of such anachronisms as the defendant company and their like, with their fluctuating body of rules and complicated business methods. If it were not so serious a matter it would seem ludicrous that persons whose only object is to become borrowers and to pay off their loans by monthly instalments, should be made to become shareholders in the company, with an uncommunicated promise of mythical profits and a certainty, if the defendants' contention were upheld, of liability to losses which would keep the loan unpaid for years, no matter how punctually the borrower might have paid, as in this case he did pay, the stipulated instalments."

This sub-section has dealt with the above and similar cases by delegating to the registrar the power to impose upon these corporations such by-laws relating to forfeiting shares or governing the withdrawal of moneys paid in on terminating shares as shall seem just and reasonable.

This has now been done; a common form of by-law has been approved and issued by the registrar, and there can no longer be any doubt as to the rights of shareholders, whether borrowing or non-borrowing,

Section 7. By s. 104 of the Loan Corporations Act three distinct registers have to be kept in order to distinguish the different classes of companies seeking registration, according to the kind of business which they carry on.

Some companies not incorporated in Ontario have under their charters very large powers, almost unlimited powers, in regard to issuing debentures, etc., and danger to the public was thought likely to result in consequence of this.

The object of this section is to compel companies seeking registration to confine themselves to their proper and legitimate business. This section effects that object by limiting the powers of trust companies to those given to such bodies under the Ontario Act, and by permitting registration of loan corporations on one register only, and forbidding the transaction of business other than that for which registration has been granted.

Section 9 aims at doing away with an illegitimate class of "fake" loan societies. In order to evade the wholesome regulations of the Loan Corporations Act, the ingenious device has been adopted of avoiding incorporation and registering as partnerships, under various names, such as "unions," "associations."

The use of such names has been found to deceive the public and to lead it to believe that it is doing business with a duly incorporated body.

Chapter 17. This Act has to do with the very important subject of fenders for street railways, and provides that where cars are equipped with fenders of a class approved by order-in-council, the company shall not be liable for non-compliance with any by-law or agreement relating to the class of fenders to be used in any city or municipality.

This imposes a serious responsibility upon the Provincial Government in regard to a very pressing matter.

Chapter 18. One hundred and sixty-five amendments to the Municipal Act are happily followed by "The Consolidated Municipal Act, 1903" (see chapter 19).

A summary of this legislation would require to be undertaken by an expert and at greater length than can be given in the pages of a magazine.

Some points of general interest should however be noted. Two somewhat radical changes in principle are made. The first is contained in s. 2 (b), which, coupled with s. 105, makes a "referendum" possible in regard to any question.

"Elector" is now not merely "a person entitled to vote at any municipal election or in respect of any by-law," but also in respect of "a resolution or question."

Section 105 allows by-laws to be passed for the submission of questions of general policy to a vote of the electors at any annual municipal election, and for defining those entitled to vote, and the necessary details incidental thereto.

This seems to get over the cases of which *King v. City of Toronto* (5 O. L. R. 163) is the latest.

Section 14 permits a change to be made in the composition of county councils, by which they may be composed of the reeves of townships and villages and the mayors of towns not separated from the county, instead of the representatives of the county council divisions as heretofore.

Section 19 enacts that in the case of cities having a population of over 100,000 inhabitants a by-law may be passed for the holding of the municipal elections on the 1st day of January, instead of the first Monday in January, as provided by the amended section. This has been long desired by the city of Toronto.

Section 32 removes difficulties as to the remedy in case a man, duly qualified at the time of his election, thereafter becomes disqualified, as by entering into a contract with the municipality. Under this amended section not merely the "election" or the appointment, but the "right to hold the seat" and "the right to sit" may be questioned.

The proceeding is not to be by quo warranto (s. 45), but by means of the procedure prescribed by the Municipal Act (ss. 219 et seq.).



Section 56 provides for the election in the city of Toronto of a mayor and four controllers to be elected from the city at large.

In addition to having a property qualification, no person may be elected as controller who has not served for at least two years as a member of the city council prior to the date of his nomination, so that no "prentice hand" may aspire to this high position. The number of aldermen is reduced from twenty-four to eighteen.

The second important change in principle above referred to is to be found in s.-s. (6) of this section, by which the practice of cumulative voting is adopted for the election of controllers; the voter may distribute his four votes as he pleases, either one to each of the candidates or four to one of them.

By s. 109 power is given to prevent (by by-law) the posting up of placards, playbills, etc., which are indecent or may tend to corrupt or demoralize the public or individuals. The latter clause will, it is hoped, prevent the corruption of the youthful mind by the exhibition of criminal acts which, though not indecent, and therefore not within the former provisions, are yet eminently calculated to demoralize and deprave the young.

By s. 110, by-laws may be passed to prohibit the filthy practice of spitting on sidewalks, pavements, passageways, stairways, and entrances to buildings used by the public, etc.

This habit is now known to be not merely offensive to decent people, but a menace to the public health.

By-laws should be promptly passed under both of these sections, and rigorously enforced.

Section 117, a reminiscence of the great coal strike, permits cities and towns to temporarily operate fuel yards in anticipation of or during a period of scarcity or threatened scarcity or failure of supply of fuel. This requires an order-in-council, to enable it to be done, and the by-law, though requiring a two-thirds vote of the council, need not be submitted to the ratepayers.

Section 130 makes a change in regard to accident cases brought against a corporation under s. 606 of the Municipal

Act. The want or insufficiency of notice of action is no longer to be a bar to the action, except in cases where the action is founded upon the existence of snow or ice upon the sidewalk.

In all other cases the Judge at the trial may dispense with the notice if in his opinion there is reasonable excuse for the want or insufficiency of the notice, and the defendants have not thereby been prejudiced in their defence.

Section 146 deals with local improvements.

Under the former law (s. 669), where proceedings were taken under the initiative method, and a sufficient petition had been presented against the work, no further steps could be taken by the council within two years thereafter. Often disputes merely as to the cost and character of the proposed work have blocked improvements admitted to be necessary. The amending section allows a new notice to be given within the two years when the notice is for a different kind of pavement or a less expensive one of the same kind.

Section 152 is important as far as cities having over 100,000 inhabitants are concerned.

It provides for the case of a street reported by the engineer to be out of repair, foundering, and dangerous, and to be an important thoroughfare, so that public safety requires it to be put into proper condition.

Then the council may by resolution or the adoption of the report passed on a two-thirds vote of all the members, overrule the opposition of the ratepayers, and have the work done. The corporation must in such case contribute more liberally than in other cases to the expense of the work.

Dundas street, in respect to which an indictment has been presented against the city of Toronto, will now, no doubt, soon cease to be a public nuisance.

Section 158 provides for bringing under local improvement rates land which, at the time the improvement was initiated, was exempt, but which has since ceased to be exempt, from a change of owner or other circumstance. This is an eminently fair provision.

The *modus operandi* is pointed out in c. 21, s. 4, by which the Assessment Act is amended.

Chapter 21: An Act to amend the Assessment Act.

Section 1 makes clear what kinds of educational institutions are exempted from taxation. They are divided into two classes, (a) public educational institutions, and (b) other schools which are conducted in conformity with regulations to be prescribed by the Lieutenant-Governor in Council.

Section 3 will be welcome to persons with small incomes: it raises the amount of the annual income derived from personal earnings which is to be exempt, to \$1,000, instead of \$700 as heretofore.

Section 7 was an anticipation of the decision, not then delivered, in the case of *Re Toronto R. W. Co. and City of Toronto* (2 O. W. R. 579), and by amending the Assessment Act in regard to "plant and appliances" of street railway or electric railway companies, makes the law clear as being what the Court of Appeal afterwards held it to be under the unamended Act.

Section 11 makes plain what a municipality may do in the case of a second sale after one abortive one.

The original section provided that where at such abortive sale the municipality desired to become the purchaser of any of the property for the amount of the arrears of taxes due thereon, it should be at liberty to do so after "giving notice in writing of intention so to do."

The practice usually was to give this notice by advertising in some newspaper. The legality of doing this was questioned, but the practice is now sanctioned by substituting for "notice in writing" the words "by public advertisement in the local newspaper or in one of the local newspapers in which the original sale was advertised."

Section 12 is a curative section; it has been found difficult in cities to comply strictly with the somewhat cumbersome provisions of the Assessment Act, more especially in regard to the dates for taking certain steps. This section provides that as long as the provisions of the Act in other respects are duly complied with, the performance of any

duty after the date or within a longer period than that prescribed shall not invalidate proceedings. (See *Kennan v. Turner*, 5 O. L. R. 560.)

Chapter 25. Attention may well be called to c. 25, a general Act giving power to municipal corporations to construct works for the development and transmission of electrical and other power and defining the mode of procedure to be adopted by the corporations in such cases.

A considerable addition is made to the duties of the Chief Justice of Ontario by this Act, if it be made much use of. Upon him is to rest the appointment, control, removal, etc., of commissioners to be appointed under the Act, the fixing of their remuneration, the settlement of disputes between commissioners, corporations, and any other persons, the authorizing of a special bond issue, and other matters of an administrative rather than a judicial character, and requiring much thought and time in the performance of them.

Chapter 27. This Act, now well known, regulates the speed and operation of motor vehicles on highways, and if the provisions are strictly enforced will be very useful for the protection of the public.

Useful provisions are contained in c. 28, an Act respecting Circuses; c. 29, an Act to amend the Public Health Act; c. 30, amending the Children's Protection Act of Ontario; and c. 37, relating to Industrial Schools, but not such as to call for any special comment in this article.

Chapter 31. This statute is now well known. It abolishes, in cities having 100,000 inhabitants or more, the present system of three sets of governing bodies for schools, Public School Trustees, High School Trustees, and Technical School Board, and in lieu thereof establishes a "Board of Education" composed of twelve members to be elected by a general vote, and two to be appointed by the Separate School Board of the City. The cumulative system of voting is again applied. Each elector has twelve votes; of these he may give three to any one or more candidates up to four, or he may distribute in any way that he likes as long as he gives no more than three to any one candidate.

N. W. HOYLES.

## EDITORIAL REVIEW.

**The Alaskan Boundary Verdict.**

The news that the Alaskan Boundary Commission had decided the main points of the controversy in favour of the United States was received in Canada at first with incredulity and then with indignation. It was from the first assumed here that the United States had no case. It would not consent to a reference to indifferent arbitrators; it would not have a tribunal of three, five, or seven with one indifferent arbitrator or umpire. Its nominees on the commission were not only citizens of the United States, but men whose opinions on the very question they were to judge had been formed and enunciated. It certainly looked as if the United States stood in fear of an impartial tribunal, and everyone took it for granted that its commissioners would decide in favour of their own country's claim. Britain and Canada had shewn no such fear. The commissioners appointed had no known views on the matter. But it was generally anticipated that the members of the commission would be equally divided in opinion, the British commissioners impelled by the strength of the case for Canada; and that there would be no decision. By the verdict of the commission, however, the United States retains all its present Alaskan territory, shutting Canada away from the sea along the entire length of the Alaskan "pan-handle," except at the southern extremity, where a small strip given to the Dominion enables her perhaps to control the Portland canal and two of its islands which overlook Port Simpson, the proposed terminus of the Grand Trunk Pacific Railway. Lord Alverstone joined the United States commissioners in this verdict, but the Canadian commissioners, Sir Louis Jetté and Mr. Aylesworth, refused to sign the report, and have in effect accused Lord Alverstone of changing his mind after he had approved a memorandum, and of giving his adherence to the verdict for diplomatic rather than judicial

reasons. This has of course caused the indignation we speak of. Canadians could stomach an adverse award, but they rebel against a diplomatic compromise masquerading as the deliverance of jurists upon evidence. As matters stand at the time of writing, Lord Alverstone refuses to answer the charge made against him, and everybody is puzzled. The Lord Chief Justice's reputation is such that it is difficult to believe him capable of such conduct as is attributed to him, while, on the other hand, the Canadian commissioners are men whose whole training and mode of life and thought would tend to make them slow to utter charges which were not well-founded or could not readily be substantiated. We await further light on this perplexing matter, the great importance of which is manifest.

#### **Retirement of County Court Judges.**

It is stated in the daily newspapers that the following County Court Judges in Ontario will retire at once, having reached the age limit fixed by a recent Act of the Dominion Parliament:—Judge D. J. Hughes of Elgin county, age 83; Judge William Elliot of Middlesex, age 85; Judge O'Brien of Prescott and Russell, age 83; Judge Deacon of Renfrew, age 80; Judge Woods of Kent, age 84. It is also stated that none of the Superior Court Judges of the Province exceeds the age of 70. By the Act referred to a Judge of the Supreme Court of Canada or of any Superior Court is entitled, upon resignation, if 75 and a Judge of 20 years' standing, or if 70 and a Judge of 25 years standing, or if a Judge of 30 years' standing, to retire upon a life annuity equal to the salary received.

#### **Recent American Decisions.**

*Bills, Notes, and Cheques.*—Payment by the drawee of forged cheques made payable to a fictitious person to one who cashed them upon an indorsement purporting to be that of the payee, without requiring identification of the one to whom payment was made, is held, in *Canadian Bank of Commerce v. Bingham* (Wash.), 60 L. R. A. 955, not to prevent his recovering back the money so paid, where he was ignorant

of the facts, and relied upon the indorsement of the one who cashed the cheques, and the latter will not be placed in a worse position by the recovery than he would have been had the cheques not been paid.

A promissory note payable at a future day to an incorporated charitable educational institution dependent for the most part on voluntary contributions for its support, the amount thereof to form by itself, or with other similar contributions, a permanent endowment fund for such institution, which is accepted by the board of directors, and in reliance upon which such institution continues its work, and incurs debts and obligations, and solicits subscriptions from others, is held, in *Albert Lea College v. Brown* (Minn.), 60 L. R. A. 870, to be supported by a sufficient consideration, and not to be revoked by the maker's death before its maturity.

The amount of a note given for medical services by an unlicensed practitioner is held, in *Citizens' State Bank v. Nore* (Neb.), 60 L. R. A. 737, to be recoverable by a bona fide purchaser, notwithstanding the provisions of a statute prohibiting the practice of medicine without a license.

*Carriers.*—A railway company is held, in *Brunswick & W. R. Co. v. Ponder* (Ga.), 60 L. R. A. 713, not to be liable to a passenger illegally arrested by officers of the law under colour of their office, for failure to interfere and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom. •

The construction of a freight platform so near a railway track that the elbow of a passenger may come in contact with freight on the platform as the passenger is seated inside of a passing car with his elbow resting on the sill of one of the windows of the car and protruding but slightly, is held, in *Kird v. New Orleans & N. W. R. Co.* (La.), 60 L. R. A. 727, to be gross negligence on the part of the railway company, rendering it responsible in damages to a passenger injured thereby.

Only what a passenger takes with him for his own personal use and convenience is held, in *Illinois C. R. Co. v. Matthews* (Ky), 60 L. R. A. 846, to be within the meaning of a statute requiring carriers to check baggage.

*Contract.*—A clause in a contract for a tour to conduct entertainments, the performance of which will extend into several countries, that suits upon it shall be brought in the country where the contracting parties are domiciled, is held, in *Mittenthal v. Mascagni* (Mass), 60 L. R. A. 812, to be valid and enforceable by the Courts of other countries.

The naming of a child for promissor in accordance with his previous request, is held, in *Daily v. Minnick* (Iowa), 60 L. R. A. 840, to be a sufficient consideration for a subsequent promise to convey to the child a particular tract of land because of such act.

*Damages.*—The measure of damages for wrongfully disconnecting a telephone because of a mistake as to the payment of rent is held, in *Cumberland Teleph. & Teleg. Co. v. Hendon* (Ky.), 60 L. R. A. 849, to be the amount which will compensate the patron for the injuries caused by the breach of contract.

*Husband and Wife.*—An injunction against a husband, in a suit which does not seek the dissolution of the marriage, to restrain him from further interference with his wife's separate estate, is held, in *Dority v. Dority* (Tex.), 60 L. R. A. 941, to be properly granted, notwithstanding the statute gives him the sole management of her estate during marriage, where he refuses to support her, and so diverts the income of her property as to deprive her of the benefit which the law entitles her to receive therefrom through his management.

*Insurance.*—The breaking of a plate-glass window by the explosion of gas generated by the use of gasoline to clean clothes is held, in *Vorse v. New Jersey Plate-Glass Ins. Co.* (Iowa), 60 L. R. A. 838, not to be caused by the blowing up of the building, within the meaning of the insurance policy thereon which exempts the insurer from loss caused by the blowing up of buildings.

Receiving the premium after the destruction of all the insured property, so that nothing remains to which insurance might attach, is held, in *German Ins. Co. v. Shader* (Neb.), 60 L. R. A. 918, to waive a provision in a policy that the



insurer shall not be liable for a loss occurring before payment of the premium.

*Murder.*—A master who whips a servant so that he dies is held, in *State v. Shaw* (S. C.), 60 L. R. A. 801, to be guilty of murder, although he has a right to inflict the punishment, and the instrument is proper, if the punishment is so prolonged and barbarous as to indicate malice. A note to this case collates the other authorities on homicide by excessive or improper chastisement.

*Property in News.*—The news of market quotations and sporting items gathered and furnished by a telegraph company to its patrons by means of tickers is held, in *National Teleg. News Co. v. Western U. Teleg. Co.* (C. C. App. 7th C.), 60 L. R. A. 805, to be property which will be protected by equity against appropriation by rival companies who intend to furnish it to their patrons in competition with complainants to the injury or destruction of the service.

Facts with reference to contemplated buildings or improvements which have been ascertained promptly by effort and expense and compiled and put in form for the use of contractors, having a commercial value so long as they are not generally known, are held, in *F. W. Dodge Co. v. Construction Information Co.* (Mass.), 60 L. R. A. 810, to be property, and entitled to protection in equity as such.

## BOOK REVIEWS.

**Scintillæ Juris (5th ed.) and Meditations in the Tea Room (3rd ed.).** By the Hon. Mr. Justice Darling, with Colophon by the late Sir Frank Lockwood, Q.C.. M.P. London: Stevens and Haynes: 1903.

When we, in August last, published the article on Mr. Justice Darling, we were not aware that Messrs. Stevens & Haynes had just issued in one attractive volume a 5th edition of "Scintillæ Juris" and a 3rd edition of "Meditations in the Tea Room," by the learned Judge whose versatile talents are evinced both on the Bench and at the literary desk. A prominent member of the Canadian Bar attended at his Court during this summer, and writes that his judgments are spicy, his manner unconventional, and that he is sensible, original, and pithy in everything he says. The style of the learned author of the book reviewed is vivid and unique; he reasons by a sort of inverted process which attracts attention; and a perusal of the work, which is brimful of incisive wit and knowledge of human nature, will act as a bracing mental tonic to a tired mind. Lawyers and Judges, laymen and politicians, are all hit by the shafts of his irony, but the wounds heal easily, and indeed may be cherished like some other "darling woes" that lawyers wot of. A few quotations will best illustrate the book, and some may not be found inappropriate at the present time in view of the Chamberlain campaign, the Alaska Boundary Award, and other incidents of the "passing show."

"The pleasure of having property lies more in the excluding from it of others than in the occupying of it ourselves."

"My learned brother was hardly orthodox in railway cases."

"'Tis with our judgments as our watches, none  
Go just alike, yet each believes his own."

"*Boni judicis est ampliare jurisdictionem.* It is characteristic of a good general to extend the area of the country he can hold and plunder."

"The State is rather a fortress than a city of refuge. It serves for us to live in, but cramps us sadly. We can play the policeman, the missionary, and the bandit as we choose. We can free the slave by enslaving his master."

"We have had statesmen who, though commanding in chief, have spent all their energies in defending some little block-house upon the frontier of affairs, while the enemy has been at the gates of their capital. But few indeed are the names of those who, over all the field of battle, and through all the dust and smoke of the combat, have looked forth with calmness to act with wisdom."

"I suppose it was in the woods, where they had observed the good effects of having now a fine day and then a wet one, that our ancestors conceived the happy idea of governing by party. . . . First by those we esteem wise and good, and then by those we hold foolish and vicious."

"To sacrifice one's honour to one's party is so unselfish an act that our most generous statesmen have not hesitated to do it."

"Kings, like diamonds, serve many useful ends, and are yet most esteemed because of their rarity. Rebellion is the prerogative of subjects."

"The tradesman who, in the County Court, has seen his neighbour compelled to retire behind a coveted party-wall, or driven from a convenient but exclusive pump, loudly proclaims the suppression of international trespass by means of international litigation."

"There are no overflowing floods of (popular) folly, perhaps; but a constant and fertilizing stream of it none the less meanders through the land."

"An apparent injustice may be worth more than many a position of credit, and has before now formed the stock in trade of a whole nation."

"Could this country ever have earned praise for its generosity if it had always been just?"

"When we have all read and practised the theories of Mr. Mill and his followers, we may, perhaps, be a very worthy people, and like all of that class, play but a small part in the world."

"Much was not foreseen by those who first advocated free trade. I suppose few will deny that of late years there has been less of insularity—some would say less of patriotism—amongst us than there was, and undoubtedly there has been more foreign meat and drink for us. That the modern popular affectation of citizenship of the world is due to a pabulum of some sort, I believe no one will be inclined to deny. . . . For my part, I think it is to be found on the wharves along the Thames."

"Who will maintain that the embargoes laid by us upon the goods of our enemies do not aggravate our differences, and so prolong our wars? And by this light can anyone fail to see a new and touching significance in the application of the phrase 'the most favoured nation' to that people whose fruit we encourage ourselves to eat."

"Because all foreign policy must rely for its success upon the force by which, if necessary, it will be supported, and not upon justice or reason, what is called international law is, in effect, non-existent—the dream of jurists seeking to enlarge their field of action."

"Expediency resembles true selfishness, which is understood to include charity, liberality, and politeness, provided you enjoy the exercise of these qualities. We can reverse our policy by changing our ministers."

"The difference between an absolute and a limited monarchy is exactly analogous to that which distinguishes a private merchant from a limited company."

"What most recommends party government is that it enables us to slander our rulers without sedition, and overthrow them without treason."

"The contempt in which our diplomatists have long been held on the Continent is to be traced to some extent to our

dislike of subtle negotiations, and our talent for giving and taking hard knocks; but much of it is the plain result of our choosing to set at defiance the rules of the game we play. I do not doubt that some amongst us are not displeased if they read in Philipe de Comines how it was a common saying in his time that the English lost by treaties what they had gained by arms, whenever they met the negotiators of France—a fact which some writers have traced to the changeableness of our climate, by which they conceive that our character and all our institutions have been formed.”

“Party government if good is surely best when most complete; yet we, who boast of being its inventors, permit a Liberal ambassador to present the remonstrance of a Tory administration, while an American Republican will not allow a Democrat to send his letters by the post!”

While the book might not satisfy a philosopher, it is full of scintillating epigrams, home thrusts at doubtful “truths,” and thought-puncturing paragraphs.

W. N. P.

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**Ontario Fish and Game Laws.**—A digest of the whole law, Dominion and Provincial, affecting the animals, birds, and fish of Ontario, alphabetically arranged, with references to the various statutes and orders in council in force on the 28th September, 1903. By A. H. O'Brien, M.A., Barrister-at-Law. 5th ed. Toronto: The Canada Law Book Co.: 1903.

A useful and well prepared compilation.

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**Natal Law Quarterly** for the quarter ending 30th June, 1903. Edited by William T. Lee, Solicitor. Natal: The Durban Moot.

There are some good articles in this issue. Those on “Armorial Bearings” and “Domicil” are of more than local interest.

**American Law Review** for September-October, 1903.  
Editors: Seymour D. Thompson and Leonard A. Jones. St.  
Louis: Review Publishing Co.

Every lawyer should read Sir Frederick Pollock's article  
on "English Law Reporting" in this issue.

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**Law Magazine and Review** for August, 1903. London:  
Jordan & Sons.

There are interesting articles on "Specific Performance,"  
by W. Donaldson Rawlins, K.C.; "The Marriage Laws of  
Scotland," by Emile Stocquart, a Brussels advocate; and  
others.

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**General Digest American and English** for August, 1903.  
(Bi-monthly advance sheets). Rochester, N.Y.: The Law-  
yers' Co-operative Publishing Co.

An excellent and most comprehensive work.

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### ERRATA.

In the article on the "Alaska Tribunal and International Law," the reader will please make the following corrections:

Page 436, in fourth line from the last line in the second paragraph, for "And also within," read "And all were."

Page 441, in fifth line from the last line in the second paragraph, for "influent sea is perpetually," read "influent sea in perpetually."

Page 450, add just before the last line in the first paragraph before the words "adjacent arms of the sea," the following: "ocean, but also the ports, harbours, bays, and mouths of rivers, and"

## INSTRUCTIONS

is the article on the "Alaska Tribune" and International  
Law, the reader will please read the following instructions:  
From the fourth line from the top line in the second  
paragraph, for "and also which," read "and all over."  
From the fifth line from the top line in the second  
paragraph, for "infant and is particularly," read "infant  
and is particularly."  
From the sixth line from the top line in the first para-  
graph, before the words "infant and is particularly," the fol-  
lowing: "mean, but also the words 'infant and is particularly' and"



# THE CANADIAN LAW TIMES.

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DECEMBER, 1903.

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## THE ALASKA TRIBUNAL AND INTERNATIONAL LAW.

**B**EFORE reviewing the decision of the majority of the Alaska Boundary Tribunal the plain and just-minded people of both nations must admit that both Great Britain and Canada were disastrously handicapped when they submitted the international boundary dispute between Canada and Alaska to a tribunal of six members, one-half of whom, as American politicians, had previously given public expression to a decidedly hostile opinion against the then known British-Canadian claims,—subsequently formulated in the British case,—and had therefore that taint of partiality which, according to the principles of international justice, and the rules of the common law of both nations, absolutely disqualified them from sitting as judges or jurors, and eminently from being ranked as “impartial jurists of repute” which the two great sovereignties of Great Britain and the United States, as trustees of the national honour, political justice, and good faith of their respective nations, had agreed to appoint to the Tribunal.

Of those appointed by the United States, one had only three months previously denounced the British claim as “a preposterous claim set up in complete contradiction of the Treaty of 1825;” as “a most manufactured and baseless claim;” as “one which the United States could not accept, and which no nation with an ounce of self-respect could admit.”

Another had voted to reject the Treaty of Reference, alleging that "there was nothing to arbitrate."

The third was a member of the United States Government, who had advised his government to take military possession of the Disputed Territory; had stationed a garrison of soldiers in one part of it, and erected military storehouses on another portion of it. By such acts, and as a member of the Executive Government, he was a litigant party in the case, and so came within the common law maxim: "No man should be a judge in his own cause; for it is not allowable for him to be both judge and party." And also within an old rule of the common law that "no man shall be allowed to be of a jury in any case who has treated of the matter in dispute, or has declared his opinion on the matter beforehand."

With such prejudiced and therefore disqualified colleagues it was judicially, politically, and humanly impossible that impartial justice could be administered, or the recognized doctrines of International Law could be given effect to. And it would have been appropriate that a diplomatic protest should have been made against appointments which dishonoured the real impartiality of Tribunals of International Arbitration, and the breach of the Treaty contract to refer the international dispute to "impartial jurists of repute." But in any event it might have prevented the alleged miscarriage of justice had the British jurists declined to join in any decision as a judicial protest on their part against the violations of the maxims of the common law, and the public faith in international justice and moral principles which should govern nations; for it has been well said by an American author on International Law: "A State is a moral person capable of obligations as well as rights. No acts of its own can annihilate its obligations to another State."

It was within the privilege of Lord Alverstone, as President of the Tribunal, to have followed the course of his British predecessors in former Arbitrations between Great Britain and the United States, and to have refrained from disclosing how he had arrived at his decision on the questions submitted. He might have adopted the late Sir George Jessel's opinion, that it was within the right of a judge, when

sitting as a jury, to assume the privilege of jurors and give a verdict without disclosing his reasons. But as the President of the Tribunal has published his reasons, they are open to public review, but only in so far as that review is appropriate to what he has made public.

#### PORTLAND CHANNEL BOUNDARY

In considering the answer given by the majority of the Tribunal to the second question proposed by the Treaty of Reference: "What channel is the Portland Channel?" it is regrettable to notice that the majority of the Tribunal is charged by two of their fellow British jurists with being parties to "a grotesque travesty of justice by altering the unanimous vote of the tribunal," which had declared that "as to Portland Channel the case of Great Britain had been demonstrated to be unanswerable;" and then by a "compromise with the plain facts of the case, while awarding Pearse and Wales Islands to Great Britain, determined to make these islands valueless to Great Britain, or to Canada, by giving to the United States the islands called Sitklan and Kannagunut."

Before passing judgment, let the charge be tested by the findings which the learned President, on behalf of that majority, has published as to Portland Channel, and by his reasons therefor.

He finds: "That one entrance of Portland Channel was between the islands now known as Kannagunut and Tongas Islands." This admittedly was the north entrance into Portland Channel, directly south of Tongas Island. Then he adds:

"The narrative of Vancouver refers to the channel between Wales Island and Sitklan Island, known as Tongas Passage, as a passage leading south-south-east towards the ocean,—which he passed in hope of finding a more northern and westerly communication to the sea; and describes his subsequently finding the passage between Tongas Island on the north, and Sitklan and Kannagunut on the south. The narrative and the maps leave some doubt on the question whether he intended to name Portland Channel to include Tongas

Passage as well as the passage between Tongas Island on the north and Kannagunut Island on the south. In view of this doubt, I think, having regard to the language, that Vancouver may have intended to include Tongas Passage in that name, and looking to the relative size of the two passages, I think that the negotiators may well have thought that the Portland Channel, after passing north of Pearse and Wales Island, issued into the sea by the two passages above described."

The two passages into Portland Channel here referred to are the curved or southern passage between Wales and Sitklan Islands (adopted by the Tribunal), and the straight or northern passage between Tongas and Kannagunut Islands, which was the channel claimed by the two British jurists.

After some further observations, the President finds that "the references to Tongas Island in 1835, as being on the frontier of the Russian straits; and in 1863, as being on the north side of the Portland Canal, and in 1869, as to Tongas Island being on the boundary between Alaska and British Columbia, are strongly confirmatory of the view at which I have arrived upon the consideration of the materials which were in existence at the date of the Treaty."

Bearing in mind that "Tongas Island," mentioned in these confirmatory findings, is situated immediately over the north entrance of Portland Channel; and then applying the above findings to the plain and imperative direction in the Treaty-contract of 1825, that the course of the international boundary line, after leaving the Prince of Wales Island, "shall ascend to the north along the channel called Portland Channel," *i.e.*, shall go upward in an ascending line toward the north along Portland Channel, the question is,—why was not the imperative direction and mandate of the Treaty obeyed, and the international boundary line traced through the north entrance of Portland Channel, instead of, as the Tribunal has deflected it, first south-east and then north-east through the southern entrance of Portland Channel? By so tracing the boundary line, the President appears to have reversed the verdict-result of his findings, and to have ignored the imperative mandate of the Treaty-contract. Had the findings of the learned President been applied to the

"north" course of the line directed by the Treaty, the international boundary should have been traced through what was found on the evidence to be the north entrance into Portland Channel.

How the reversal of these findings was brought about has been unrevealed. But by the signed decision of a majority of the Tribunal, two islands, Sitklan and Kannaganut, which, on the confirmatory findings and the mandate of the Treaty of 1825, were legally within the territorial sovereignty of Great Britain, as part of the Dominion of Canada, have been ceded to the United States.

The learned President clears away some of the difficulties as to the word "coast," suggested during the arguments. He says: "The coast mentioned in Article III. is, in my opinion, the coast of the continent; and the coast referred to in the second paragraph of Article IV. is also the coast of the continent."

Inserting these terms into the Articles they read:

"III. The line of demarcation between the possessions of the High Contracting Parties, upon the coast of the continent, and the islands of North America to the north-west, shall be drawn in the manner following: Commencing from the southernmost part of the island called Prince of Wales Island, which point lies in the parallel of  $54^{\circ} 40'$ , north latitude, and between the 131st and the 133rd degrees of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from the last mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast [of the continent] as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and finally, from the same point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

"IV. With reference to the line of demarcation laid down in the preceding article, it is understood: 1. That the

island called Prince of Wales Island shall belong wholly to Russia; 2. That wherever the summit of the mountains, which extend in a direction parallel to the coast [of the continent] from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude, shall prove to be of a distance of more than ten marine leagues from the Ocean, the limit between the British possessions and the strip of coast [of the continent], which is to belong to Russia as above mentioned, shall be formed by a line parallel to the windings of the coast [of the continent], and which shall never exceed the distance of ten marine leagues therefrom."

This construction is the only intelligible one the term is capable of; and its equivalent expression may be found in "coast on the mainland," in question five; and "mainland coast on the ocean," in question six.

#### LINE CROSSING LYNN CANAL AND INLETS.

Questions five and six formulated the main crux of the disputē; whether the international boundary line crossed the bays and inlets indenting this "coast of the continent."

The fifth question asked: "Was it the intention and meaning of said Convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe, or strip, of coast on the mainland, not exceeding 10 marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the Ocean?"

The sixth question was only to become necessary in case the fifth was answered in the negative; and as to the bays and inlets it asked: "Was it the intention and meaning of the said Convention that, where the mainland coast is indented by deep inlets forming part of the territorial waters of Russia, the width of the lisiere was to be measured (a) from the line of the general direction of the mainland coast; or (b) from the line separating the waters of the Ocean from the territorial waters of Russia; or (c) from the heads of the aforesaid inlets?"

And here may be noted the loose and unscientific drafting of the Treaty of Reference of 1903, as instanced in the above

expression "territorial waters of Russia"; but more especially in clause "(b) from the line separating the waters of the Ocean from the territorial waters of Russia." The expression "territorial waters" includes not only the bays, inlets, and rivers indenting the coast, and designated "arms of the sea," but also the three marine mile belt of sea along the coast, which is subject to the territorial sovereign of the adjoining land. The question should have been limited to whether the inland territorial waters indenting the mainland coast were Russian, or part Russian and part British.

In considering these questions, it should be borne in mind—in addition to other points, hereinafter referred to—that a recognized uniform distance of three marine miles from the low-water mark of the tidal sea, determines where the Ocean begins. And as the majority of the Tribunal holds that tidal bays and inlets, being "sinuosities of the coast," are "ocean" within the Treaty expression "ten marine leagues from the Ocean;" then their low-water mark should also determine where the Tribunal's "ocean" begins.

But the mouths of tidal rivers are also "sinuosities of the coast;" and the influent sea in such tidal rivers has also its low-water mark, which should similarly determine where they become "ocean" according to the above decision. Yet International Law, because the channels of bays, inlets, and rivers are filled to the ocean's tidal level, classes them under the generic term of "arms of the sea," and considers them in regard to sovereignty as if they were land. But the action of the influent sea is perpetually, or occasionally (as in the case of shoals or strands), submerging their lands, precludes them, it is submitted, apart from authority, from being imported into the definition "Ocean;" as that term is understood in International Law.

Passing from these considerations, but keeping in mind the President's appropriate interpretation of the Treaty-term, "coast," as meaning "coast of the continent," we find that, instead of reviewing the authorities cited by the distinguished counsel for Great Britain, the learned President, after a comment on the term "ocean" (hereinafter considered), said:

"This still leaves open the interpretation of the word 'coast' to which the mountains were to be parallel. There is, as far as I know, no recognized rule of International Law which would, by implication, give a recognized meaning to the word 'coast,' as applied to such sinuosities, and such waters, different from the coast itself."

This seems a regrettable admission, for by not indicating the inapplicability of the cases cited in argument, the President admits that he had no precedents in International Law to guide him; and he thereby allows the public of the disappointed nation to suggest (as will ordinary litigants occasionally — often unjustly) that other influences than the doctrines of international law had guided him, judicially or diplomatically, in "making the law" under which he has decided against the territorial rights of Great Britain and Canada in their boundary dispute with the United States.

#### "COAST" IN INTERNATIONAL LAW.

A short review of the recognized French, United States, and British authorities on International Law will, it is submitted, furnish a recognized meaning of the term "coast" as used in the Treaty, wherever such coast is indented by the sinuosities and waters above mentioned.

And here it may be assumed that International Law being a science, has, like all other sciences, terms of art, or technical terms which have acquired clear and well recognized meanings, especially the terms "ocean," "sea," "bay," "river," "territorial waters," "continent," "coast," "shore," "nation," "sovereignty," etc.

Hautefeuille, in his "Droits et Devoirs des Nations Neutres," gives the following: "The coasts of the sea do not present a straight and regular line; they are, on the contrary, almost always indented by bays, capes, etc., etc. If the maritime domain must always be measured from each of their banks, or beaches, or strands, or shores (de chacun des points du rivage), it would result in great inconvenience. It has therefore been agreed by the usage of nations to draw an imaginary line (une ligne fictive) from one promontory [headland] to another, for the place of the departure of the



cannon shot;"—i.e., over the three mile belt of territorial water; (tom. 1, p. 59).

The "great inconvenience" referred to by Hautefeuille, has been graphically and most aptly (as to this Alaska boundary line) illustrated by the Judge of a State Supreme Court in construing a similar expression to that used in the Treaty of 1825—"ten leagues from the coast." He said: "The contracts require the upper line to be drawn parallel with the coast. How can this line be drawn parallel to the natural one, which has every imaginable curvature and sinuosity? After the whole country is surveyed, it may not be an entire impossibility to trace, upon a map at least, the counterpart of the coast line, however irregular and diversified. But can anyone imagine that a Government would require, or attempt, such a line in a wilderness, for either political purposes, or for fixing the boundaries of property? It would require more numerous monuments and landmarks to ascertain its position than perhaps any other line ever drawn upon the face of the globe. Could any officer, or citizen, ever know with precision when he had passed the boundary; or could not an offender, by dodging from post to pillar, or if he took a straight course, be in and out of the boundary one hundred times a day? Suppose every league of land was to have on its inland side curves corresponding to its curved coast boundary, the confusion and uncertainty of boundaries would be intolerable, and, of course, would never be permitted. The surveyors had no time for an operation almost impracticable in itself, and which, if completed, would have been preposterous as a line of boundary." Several surveyors were examined before the Judge; but the line which the Court held to be the only practicable compliance with the direction "ten leagues from the coast," was (1) a perpendicular line ten leagues inland from the mouth of one of the main rivers (arm of the sea), and (2) another perpendicular line ten leagues inland from the mouth of another main river (arm of the sea), (3) then a straight line joining the two inland perpendicular points (11 Texas 715).

This illustration of the "great inconvenience," and how "a preposterous boundary line" had been judicially disposed of,

may recall to mind the maxim, "*Lex neminem cogit ad vana seu inutilia.*" But a puzzling and costly labyrinth of zig-zag lines over 500 miles of a strip of coast apparently never before drawn on the face of the globe, is the diplomatic, or judicial, offspring of the Tribunal's labours.

This international doctrine of the *ligne fictive* had been recognized by the Government of the United States as early as 1793, in the case of the capture of the British ship *Grange* by a French frigate in Delaware Bay, "within its capes before she had reached the sea." The Government held that such capture was a "violation of the territory of the United States;" and it ordered the restoration of the ship to her British owners. The capes or headlands of Delaware Bay are 10.5 miles apart.

A few years later Chief Justice Marshall held in a case where the admiralty or territorial jurisdiction was in issue, that a "bay" was an enclosed part of the sea, and not subject to the Admiralty Court; but was part of the territorial domain of the state, and therefore within the territorial jurisdiction of its state court. (3 Wheat. 336).

The doctrine has also been approved by the American author Wheaton, who, in his work on International Law, commends *Hautefeuille* as "the author of the ablest Treatises on International Law that have appeared in France;" and he translates, and copies approvingly, his dictum. He also defines the term "coast" as including "the natural appendages of the territory which rise out of the water;" but that it does not properly comprehend bays and harbours. And in a note he adds that "coast is properly not the sea, but the land which bounds the sea. It is the limit of the land jurisdiction," which land jurisdiction, he says, "extends to the ports, harbours, bays, mouths of rivers, and adjacent arms of the sea, enclosed by headlands belonging to the same State" (pp. 320-1).

Halleck, another American author on International Law, concurs as to "the exclusive right of territorial domain over bays or portions of the sea, cut off by lines drawn from one promontory to another, along the coast"; i.e., cut off from the ocean by the *ligne fictive*.

Daniel Webster had previously expressed the opinion that "ports and harbours, and other navigable arms of the sea, were no parts of the high sea or open ocean, which was the common highway of the nations." And when Secretary of State he confirmed this by saying : "A bay, as is usually understood, is an arm or recess of the sea, entering from the Ocean between capes, or headlands."

This doctrine received later confirmation by the Supreme Court of the United States, which, in 1890, held that a Statute of Massachusetts was an affirmation of the law of nations, which declared that: "where an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line," [*i.e.*, Hautefeuille's *ligne fictive*] "from one headland to the other, is equivalent to the shore-line" (139 U. S. 240).

These American authorities, it is submitted, shew that the term "coast" in international law, means not only the elevated land which rises out of the ocean, but also the imaginary straight line (*ligne fictive*) across the submerged land at the mouths of bays, inlets, rivers, and other arms of the sea, of six miles' width from headland to headland, which in law becomes the territorial continuation of the coast of the mainland, and the territorial limit of the sovereignty to which the submerged land belongs, and the dividing line between such territorial waters and the Ocean. For the bay, inlet, river, or other arm of the sea, with its submerged land within cannon shot of the *ligne fictive*, is held in international law to be occupied by the sovereign of the nation, by virtue of his occupation of the adjoining headlands and coast.

This reasoning is in harmony with the earlier doctrines of Pufendorf and Grotius, the former stating that "gulfs and channels, or arms of the sea, are, according to the regular course of nations, supposed to belong to the people within whose lands they are encompassed."

This doctrine of *ligne fictive* is further recognized in the Anglo-French Treaties of 1839 and 1867, the latter providing that the distance of three miles fixed as the general limit of fishing upon the "coasts" of Great Britain and

France "shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

This same term "coast" has appeared in the British Hovering Acts since 1786, and in many other Acts of Great Britain and the United States; and has, therefore, a recognized statutory meaning consistent with that given to it by International Law.

An English authority (Willcock "On the Ocean, the River, and the Shore") quoted before the Alaska Tribunal, thus interprets the term "coast:" "In general the coast line follows the shore of the sea, but it crosses" [as *ligne fictive*] "each inlet." He adds: "The rest of the sea is the ocean, the high or open sea; it is common to all nations, and the people of all nations." And he distinguishes the coast from the sea-shore by defining the latter as being the beach, or land, which lies under the influent sea, as the tide rises to its mark at ordinary high water.

Such are the recognized rules of international law which might have been appealed to by the learned President to assist him in defining the meaning of the term "coast;" and also how, under the international doctrine of *ligne fictive*, the windings (*sinuosités*) caused by bays, inlets, and other arms of the sea, indenting a coast, are bridged over by a universally recognized coast line from headland to headland.

But the majority of the Tribunal has only partially disposed of the paradoxical claim of the United States, pointed out in the Contemporary Review last year: "By a strange discordance, the United States concede that the international boundary line crosses at ten marine leagues from the Ocean, certain territorial waters, geographically designated 'rivers;' but deny that it crosses certain other territorial waters, geographically designated 'inlets, bays, and canals;' although, as to their territorial sovereignty, international law declares that both classes of territorial waters are arms of the sea, and treats them as though they were land. The existence of such bays and canals cannot, therefore, alter the recognized doctrine of international law, or authorize variations in the inland measurement of the Alaskan *lisiere*."

The decision of the Tribunal is therefore in direct conflict with the cited authorities, and also with the judgment of Mr. Justice Story, of the Supreme Court of the United States, delivered in 1829 (also cited to the Tribunal) in which he held that Boston Harbour, having a broad open sea-mouth of about thirty miles, intersected by several islands, was an "arm of the sea," and not part of the high sea or open ocean, adding: "An arm of the sea may include various subordinate descriptions of inland waters, where the tide ebbs and flows, such as a river, harbour, creek, basin, or bay; and it is sometimes used to designate very extensive waters within the projecting capes of a country." And he also held that islands, at the mouths of such arms of the sea, are opposite shores, or headlands, "in the sense of a line running across." (5 Mason C. C. 301). The widest sea-channel of Boston Harbour is between five and six miles in width; the widest sea-channel of Lynn Canal is four and three-quarter miles in width; while Taku Inlet is only one-fifth of a mile wide, and Glacier Bay three and one-half miles wide at their ocean mouths—each of them less than the recognized width of six marine miles.

Not only, therefore, does the ratio decidendi of these doctrines of International Law conclusively sustain the British contention that the boundary line crossed Lynn Canal and the other inlets, and arms of the sea, indenting the coast of the continent; but the crossing of the boundary line was specially recognized, and made part of the Treaty in the following Article:

"VI. It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the Ocean, or from the interior of the Continent, shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers, and streams which, in their course towards the Pacific Ocean, may cross the line (*traverseront la ligne*) of demarcation upon the strip of coast described in Article III. of the present Convention."

This had been preceded by the following offer on the part of Russia:

“The plenipotentiaries of His Imperial Majesty, foreseeing the case where on the strip of the coast which would belong to Russia there should happen to be great courses of water (fleuves) by means of which the English establishments should be made to have free intercourse with the Ocean, were eager to offer, as a persuasive stipulation, the free navigation of those great courses of water.”

Taking all the above expressions together, and especially that comprehensive one, “all the rivers and streams which may cross the line of demarcation,” they could only be held to mean all the arms of the sea which cross the line of demarcation; for there is nothing in the negotiations intimating an intention to limit the “persuasive stipulation” of free intercourse with the Ocean through rivers and streams, and exclude it through inlets and bays.

Mr. Secretary Blaine’s comment in 1890, on the Treaty of 1825, may be cited as practically supporting the British claim. Referring to Article IV. he said: “Nothing is clearer than the reason for this. A strip of land at no point wider than ten marine leagues running along the Pacific Ocean from 54° 40’, was assigned to Russia by the IIIrd Article. Directly to the east of this strip of land, or, as it might be said, behind it, lay the British possessions. To shut out the inhabitants of the British possessions from the sea, by this strip of land, would have been not only unreasonable, but intolerable, to Great Britain. Russia promptly conceded the privilege, and gave to Great Britain the right of navigating all rivers crossing the strip of land from 54° 40’ to the point of intersection with the 141st degree of longitude. Without this concession the Treaty could not have been made.”

But the majority of the Tribunal has not confirmed Mr. Blaine’s opinion, for the inhabitants of the British possessions behind the long strip of the Alaskan coast are now practically shut out from the Pacific Ocean by their decision.

Finally, on this question, the modern “barrier” claim of the United States, which the majority of the Tribunal has approved, seems to have been put forward as a thin veneer to hide from British eyes one of the historic political motives of the United States Government in acquiring Alaska, and

which has been thus disclosed by Mr. Ex-Secretary Foster in his late work, *A Century of American Diplomacy*:

"Russia indicated a willingness (1845 to 1849) to give us its American possessions if we would adhere to the claim of 50° 40' on the Pacific, and exclude Great Britain from that Ocean on the American Continent." . . . Mr. Seward stated, soon after the cession was perfected, that his object in acquiring Alaska was to prevent its purchase by England, thereby preventing the extension of England's coast line on the Pacific."

And Senator Sumner, when the Alaska Treaty was before the Senate, admitted that "the motive of the United States for the acquisition of Alaska might be found in a desire to anticipate the imagined schemes, or necessities, of Great Britain, as it had been sometimes said that Great Britain desired to buy, if Russia would sell."

#### THE TERM "OCEAN" IN THE TREATY.

Dealing next with the term "ocean," in the Treaty, the President says that he finds a difficulty in the use of that term. And he is perhaps warranted in saying that, in ordinary parlance, no one would call the channels or passages between the islands, and between the islands and the coast of Alaska, "ocean." But, laying aside the preceding references, its identity as "Pacific Ocean," in other Articles of the Treaty, and as affirmed in the Behring Sea Arbitration, is clear. An examination of the historic evolution of that term in the negotiations which led up to the Treaty, will, it is submitted, clear away the stated difficulty, and shew how, after some controversy, the term "Ocean" got into the Treaty, and what the signatory powers meant by its final adoption.

In July, 1824, draft "projets" of treaty were interchanged between the British and Russian Governments, which provided that the inland width of the Russian strip of coast was to be measured from the sea (*la mer*). Each of these projets was rejected. Another draft was then submitted in December, by the British proposing "ten marine leagues from the Pacifick." This was followed on the 1st February, 1825,

by another draft in which they proposed, "ten marine leagues from the Pacific Sea." The Russian Foreign Office struck out the words "Pacific Sea" and reinstated their original "la mer;" but left untouched the expressions "Ocean" and "Pacific Ocean," in the other Articles. This change to "la mer" was rejected by the British; and finally both nations agreed to adopt the expression, "ten marine leagues from the Ocean," in the Treaty signed on the 16-28 February, 1825.

The final substitution of the term "ocean" for "sea," shews that the diplomatists adopted the more accurate term. International Law gives a wider interpretation to the term 'sea,' than it gives to the term "ocean"; for it makes the term "sea" include, as stated by Mr. Wheaton, not only the adjacent arms of the sea, indenting the ocean-coast.

Thus the diplomatic contest of "ocean" and 'mer' for a place in the fourth Article of the Treaty, resulted in the British victory of "ocean" over the Russian "mer." But Great Britain has been deprived of the fruits of that victory by the decision of the majority of the Tribunal respecting Lynn Canal and the other inlets indenting the Alaskan coast.

#### THE TRIBUNAL'S INCONSISTENT INTERPRETATIONS.

It is a maxim of legislative interpretation that where the same expression occurs in various sections of a statute, it shall receive a uniform interpretation in every part of the Act. The maxim applies to Treaties which are of the nature of international laws. And Lord Alverstone, in discussing the term "coast," as used in the Treaty, properly negatives its "being used in two different meanings in the same clause." But when discussing the term "Ocean" in the same Treaty he seeks to show that it has inconsistent meanings by saying, "It cannot, I think, be disputed that, for the purposes of the Treaty, the waters between those [Wrangell and other] islands and the mainland, were included in the word "Ocean." The expression "coast of the mainland"—which the 4th Article makes convertible with "Ocean,"—was used to indicate the long trend of waters along that coast. The term "coast"—instead of "shore,"



—carried into the Treaty the international doctrine of *ligne fictive*, and thereby excluded bays and inlets indenting that coast from the term “Ocean.” The President admitted this when he said that no one would describe himself, when reaching “the head of Lynn Canal, or Taku Inlet, as being upon the Ocean.” But his decision negatives this, and gives to Lynn Canal—which, in International Law, is an inland arm of the sea, and subject to the sovereign of the coast—equal rank and meaning in International Law to that of “Ocean,” which is the common highway of nations, and subject to no nation or sovereign,—a Tribunal mosaic of the square pegs of legal science forced into the sinuous holes of diplomatic finesse.

Turning now to the words of the Treaty of 1825, it will appear that the “summits of the mountains parallel to the coast” were designated as the primary international boundary line, conditional, however, on their inland limit; and it prescribed what should be the base or datum line of that dominant limit, which may be put in terse phraseology thus: “Whenever the summit of the mountains which extend in a direction parallel to the coast . . . shall prove to be of a distance of more than ten marine leagues from the Ocean, . . . the line parallel to the windings of the coast shall never exceed the distance of ten marine leagues therefrom.” These words clearly made the ocean coast of the mainland the base or datum line of the inland measurement.

But the learned President again says: “It is difficult to see how the words “summit of the mountains” could be applicable if it was contemplated that there might be a gap of six miles between summit and summit crossing the water.” His difficulty is clearly removed by the Treaty providing for the absence of mountain summits for a boundary line, by the alternative of a substitute boundary line “ten marine leagues from the Ocean;” and if, instead of a gap of six miles caused by water, the gap was caused by a level prairie of six, or sixty, miles between summit and summit, would the Tribunal have been warranted in going inland and round the level prairie until they found mountain summits? The

submerged land of the inlets is as bare of mountain summits as the level land of the prairie; and, that being so, where is the suggested difficulty?

PROBABLE EFFECT ON THE FISHERY CLAUSES OF 1818.

The ratio decidendi of the Tribunal's decision makes the term "coast," synonymous with the term "shore"—a term appropriate to bays, tidal rivers, and inlets; and it may enable the United States to raise an influential argument against the persistent enforcement of the doctrine of "ligne fictive" by Great Britain against the claims of American fishermen, under the Treaty of 1818. By that Treaty, the United States renounced forever any liberty theretofore enjoyed, or claimed by their inhabitants, "to take, dry, or cure fish on, or within, three marine miles of any of the coasts, bays, creeks, or harbours, of His Majesty's dominions in America," other than the localities previously specified.

The argument of Mr. Rush against that enforcement was: "We inserted the clause of renunciation. In signing it, we retained the right of fishing in the sea, whether called bay, gulf, or by whatever name designated, that washed the coast of the British North American Provinces—with the single exception that we should not come within a marine league of its shore." And the American Minister, Mr. Stevenson, complained to Lord Palmerston in 1841, that Canada had "assumed the right to exclude the fishing vessels of the United States from all bays; and likewise to prohibit their approach within three miles of a line drawn from headland to headland—instead of from the indents of the shores of the Provinces."

It was further contended by the United States that where the bay widened beyond six miles within its headlands, that American fishermen could ply their avocation so long as they kept outside of the three miles from its interior shores. But the British Government held that the sovereignty over the bay as British territorial water could not be questioned where the mouth was six miles wide—thus giving practical recognition to the international doctrine of the ligne fictive.

## MOUNTAINS PARALLEL TO THE COAST.

Then as to the seventh question: "What are the mountains situated parallel to the coast?" The British originally proposed the sea-ward base of the mountains as the boundary line. Russia objected, because the mountains might slope directly to the ocean, and practically give them no foothold on the coast, and asked that the line should be on the summit of "the mountains bordering on the coast." This was considered in the Treaty by the words: "the summit of the mountains situated parallel to the coast." But the majority of the Tribunal has adopted a line which, at a number of points, rests on mountains lying far inland from the coast, and separated from it by nearer mountains, which come more within the words of the treaty as "situated parallel to the coast," than those selected by the Tribunal.

It may be fairly claimed that any alleged acquiescence of Great Britain in the occupation by the United States of Lynn Canal or other portions of the Disputed Territory, had been abandoned by the unconditional terms of the Treaty-Conventions of 1892 and 1894, by which the two nations reaffirmed the contract of the Anglo-Russian Treaty of 1825, and agreed to delimitate the international boundary line "in accordance with the spirit and intent of the existing Treaties" of 1825 and 1867. The effect of such unconditional reaffirmation was to free the boundary dispute of any alleged rights or equities arising out of prior acts of occupation, or prior settlements, by the United States, and of Great Britain's alleged acquiescence in the same which might have been claimable against her by the United States. But the conclusive legal doctrine of the Treaty-Conventions of 1892 and 1894, appears to have been waived by Great Britain in Article III. of the Treaty of Reference of 1903, which allowed the Tribunal "to take into consideration any action of the several governments preliminary, or subsequent, to the conclusion of the said Treaties" of 1825 and 1867.

## DECISIONS NOT PRECEDENTS IN INTERNATIONAL LAW.

Taking into consideration how the several questions proposed by the Treaty of Reference have been answered, and

testing the answers by the findings of fact, and the meanings given by International Law to the geographical terms "coast" and "ocean" used in the Treaty, and submitting them to the clear reasons of the principles and doctrines of International Law, and also to the more crucial tests of ordinary law as authoritatively expounded in reported cases, it is unfortunate that the decisions of the majority of the Alaska Boundary Tribunal do not seem to have that legal or logical force and consistency which would make them acceptable as judicial authorities; or entitled to be enthroned as unchallengeable precedents in International Law for the guidance of future tribunals of International Arbitration. They partake more of the flavour and quality of what may be termed the political compromises which diplomatic exigencies require, or diplomatic finesse approves; and they painfully revive the historic remembrances of those diplomatic disasters which, in other days, have ceded portions of the original territorial domain of Canada, won on the Plains of Abraham, for the territorial enlargement of the United States, and which have been thus truly stated in Problems of Greater Britain: "It is a fact that in by-gone days British diplomacy has cost Canada dear."

THOMAS HODGINS.

## EDITORIAL REVIEW.

**Judges and Extra-Judicial Employment.**

We call attention to the letter of Mr. Justice Martin, post. The learned Judge has drawn the veil which usually hides the sentiments of the Judges themselves upon matters which so closely affect them as their own salaries and perquisites. We cannot believe that his outspoken remarks will be productive of anything but good. We have yet to hear of any absolute dissent from Mr. Ewart's views. Mr. Justice Martin in some respects goes further and speaks more plainly than Mr. Ewart.

**The New Exchequer Division.**

The names of the new Judges of the High Court of Ontario who are to compose the Exchequer Division have not yet been revealed to an anxious public; but it seems to be known, in the way that such things are known, that the Chief Justice (or should it not be Chief Baron?), as well as the Puisnes, is to come direct from the Bar.

**The Application of Judicial Strength.**

The following remarks of a correspondent of the *London Law Times* are worthy of consideration:—"We could have a far larger number of Judges at a less cost to the community than we now bear, if only we were bold enough to take the proper step, namely: Be content to waste the time of the Judges. That sounds paradoxical, but the explanation is simple. Somebody's time must always be wasted over the trial of cases. It is impossible to tell how long a trial will last—nothing is more uncertain. Our present method is to give the Judges such a daily list of cases that they shall be certain to have 'something to go on with'—that is, so that the Judges' time shall not be wasted. But this means that

large sums of money are wasted daily in keeping idle at the Law Courts parties, witnesses, and solicitors who are waiting for cases which are in the day's list, but which will not be reached. In this way thousands of pounds are thrown away every week in order to save a percentage (say, 20 per cent.) of £5,000 a year. To my thinking, that is not business. Consider the saving to the community of a daily cause list of two cases for one Judge; cause A to be taken at 10.30 a.m.; cause B not to be taken before 12.30 p.m.; and then set off the comparatively trifling cost of, say, an hour of the Judge's time." *Mutatis mutandis*, the remarks are applicable in Ontario, and probably in the other Canadian Provinces. In Ontario especially, in view of the increase in the number of High Court Judges, the plan might be tried. Altogether too much importance is attached to "keeping the Judges busy."

#### **Police Magistrate Practising**

By s. 19 of the Ontario Statute Law Amendment Act, 1903, 3 Edw. VII. c. 7, s.-s. 2 of s. 36 of the Act respecting police magistrates, R. S. O. 1897 c. 87, is amended by adding thereto the words "but this sub-section shall not apply to a deputy or second police magistrate." The effect of this is, we take it, to allow a deputy or second magistrate in a city having a population of over 300,000 to practise as a barrister or solicitor, except as provided in s.-s. 1 of s. 36. He is still subject to the prohibition of s.-s. 1 against acting in criminal causes or matters. In our review of the Statutes of Ontario for 1903, the comment (*ante* p. 403) on s. 19 was based on the mistaken view that the amendment applied to s.-s. 1 of s. 36.

#### **How a Library Grows.**

During 1902 the Library of the County of York (Province of Ontario) Law Association was increased by 74 volumes of reports, 6 of digests, 18 of statutes, 20 of periodicals, 37 of text books, 19 of sessional papers, and 8 of miscellaneous publications: 182 volumes in all. Among the text books are several Canadian works. This library keeps well up to date and is very useful to the members of the Bar and others.

**Selected Bar Anecdotes.**

The following are vouched for as actual occurrences in the Province of Ontario.

The Court called for *ex parte* applications first. A barrister (of Irish extraction) arose and made a motion, to which, when he sat down, another proceeded to shew cause. The Court was astonished. "I thought you said it was an *ex parte* application." "Yes, me lard; it is *ex parte* in the sinse that there's no rale answer to it."

Two barristers on circuit were briefed for the plaintiff in the same case. They had no consultation until the evening before the case was to be called, when they met at eight o'clock. One said to the other that there were twenty-three points against the plaintiff. They proceeded to discuss the points, and had discussed three of them, when they found it was two o'clock in the morning, and they went to bed. The case was called at ten, and the plaintiff was promptly bowled out—but not on one of the twenty-three points.

**Recent American Decisions.**

*Bills and Notes.*—A contract of indorsement of a promissory note is held, in *Spies v. National City Bank (N.Y.)*, 61 L. R. A. 193, to be governed by the law of the state where it is made, although the note itself is executed and payable in another state, unless the intention is to negotiate the instrument elsewhere. The subject of conflict of laws as to negotiable paper is discussed in an extensive note to this case.

*Carriers.*—One who pays a brakesman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows such instructions, is held, in *Mendenhall v. Atchison, T. & S. F. R. Co. (Kan.)*, 61 L. R. A. 120, not to be a passenger.

A passenger going upon a railway train is held, in *Kansas City, Ft. Scott & M. R. Co. v. Little (Kan.)*, 61 L. R. A. 122, to have a right to rely upon the representations of a local ticket agent that such train will stop at a certain point to

which he has purchased a ticket and desires to ride; and the company is held to be liable if he is compelled to leave the train before reaching his destination, because by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at such station.

*Copyright.*—An author who permits the publication in a magazine of chapters of a book on which he has a second copyright without any notice other than the general notice by the publishers of the magazine of a copyright of its matter is held, in *Mifflin v. R. H. White Co.* (C. C. App. 1st C.), 61 L. R. A. 134, to lose his exclusive rights under his copyright.

*Damages.*—In computing the damages for the breach of a contract to furnish the dresses for the trousseau of a bride of wealth and high social standing, it is held, in *Lewis v. Holmes* (La.), 61 L. R. A. 274, that the Court will take into consideration, not alone the disappointment of the bride, and her mortification and humiliation in going to her husband unprovided with a suitable trousseau, but also the fact that entertainments had been planned in her honour on her wedding tour, and at her arrival at the home of her husband, which entertainments she was obliged to forego for want of the dresses.

*Fiduciary Relationship.*—Whenever one person is placed in such a relation to another by the act or consent of such other, or of a third person, or of the law, that he becomes interested for him, or with him, in any subject of property or business, he is held, in *Trice v. Comstock* (C. C. A. 8th C.), 61 L. R. A. 176, to be in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.

*Husband and Wife.*—The giving of a note secured by deed of trust to a husband and wife jointly to secure repayment of a loan, a portion of which was advanced by each, is held, in *Johnstone v. Johnstone* (Mo.), 61 L. R. A. 166, not to create an estate by entirety, where, by statute, a man has no control of his wife's property.



*Insurance.*—The effect of a mortgage clause in an insurance policy on mortgaged property, making the loss, if any, payable to the mortgagee as his interest may appear, is held, in *Delaware Ins. Co. v. Greer* (C. C. A. 8th C.), 61 L. R. A. 137, to make the mortgagee the simple appointee of the mortgagor, to receive the proceeds of the amount of his interest, and to place his indemnity at the risk of every act and omission of the mortgagor that would avoid, terminate, or affect the insurance of the latter's interest under the terms of the policy.

Under a policy of insurance against injury caused solely by external, violent, and accidental means, which provides that it shall not cover injury resulting from any poison, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled, it is held, in *Preferred Accident Ins. Co. v. Robinson* (Fla.), 61 L. R. A. 145, that no recovery can be had for injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy whereby the irritating poison was absorbed into the eye.

Where property intended to be covered by the policy has been destroyed, and its owner has received from other insurers more than its value, it is held, in *Insurance Co. of North America v. Schall* (Md.), 61 L. R. A. 300, that equity will not compel the issuance of a policy of insurance in accordance with the provisions of a contract to insure.

Good faith on the part of the applicant for insurance in denying the existence of a bodily infirmity is held, in *Standard Life and Accident Ins. Co. v. Sale* (C. C. A. 6th C.), 61 L. R. A. 337, not to prevent its rendering the policy void, where the policy expressly states that, if a statement of its non-existence shall be untrue in any respect, the policy shall be null and void.

A contract by which an insurance company lending money on the security of a paid-up policy issued by it may, at its option, require a surrender of the policy for its cash value upon default in payment of the loan or interest thereon, is held in *New York Life Ins. Co. v. Curry* (Ky.), 61 L. R. A. 268, to be void.

*Manslaughter.*—In a prosecution for manslaughter on the ground that deceased was killed unintentionally while the slayer was in the commission of an unlawful act, it is held, in *Johnson v. State* (Ohio), 61 L. R. A. 277, that it must be shewn that the alleged unlawful act is prohibited by law. The other authorities on the question of negligent homicide are collated in a note to this case.

*Negligence.*—A manufacturer who, without giving notice of its dangerous character, supplies to another a machine which at the time of delivery he knows to be imminently dangerous to the life or limbs of anyone using it for the purpose for which it is intended, is held, in *Huset v. J. I. Case Threshing Mach. Co.* (C. C. App. 8th C.), 61 L. R. A. 303, to be liable to an employee of the vendee who sustains injury from its dangerous condition.

*Will.*—The destruction of a will expressly revoking a former one, is held, in *Stetson v. Stetson* (Ill.), 61 L. R. A. 258, to revive the earlier, under a statute providing that a will can be revoked only by a subsequent will declaring the revocation of former ones.

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## CORRESPONDENCE.

**Judges and Extra-Judicial Employment.**

*Editor* CANADIAN LAW TIMES.

Sir,—Speaking as a Judge, I have always welcomed from any source fair and temperate criticism of matters relating to the Bench, and I have not only endeavoured to profit by it, but have felt indebted to those who wrote or spoke in the spirit above mentioned, just as, on the other hand, I have ignored the rash and irresponsible utterances of those who were as recklessly astray in their facts as they were violent in their language.

It is for this reason that the Bench itself, and not merely the public, is indebted to Mr. J. S. Ewart, K.C., for the fair, frank, and fearless manner in which he has spoken and written on the question of Judges sitting on commissions and accepting extra-judicial employment and railway passes, and I, for one, heartily indorse not only his conclusions but, with one or two minor exceptions (*a*), his reasons for them as ex-

(*a*) Such as the alleged maxim, "Once a Puisne, always a Puisne." In Canada in practice this rule has only been honoured in the breach and not in the observance. Taking Mr. Ewart's own Province of Manitoba, the three last appointments to the Chief Justiceship have been from the ranks of the Puisne Judges. And who shall say that it was wrong from any point of view to elevate Mr. Justice Killam to the Chief Justiceship, and thence to the Supreme Court at Ottawa? Or the late Mr. Justice Gwynne, or Mr. Justice Armour, or the present Chief Justice of Canada? Even in England, where the large salary, £5,000 per annum, might perhaps be supposed to be the origin of the maxim as tending to satisfy any reasonable man, it is not observed in the face of merit. To take only a few late examples; was it wrong to promote Lord Justice Russell to be Lord Chief Justice? or Mr. Justice Matthew to be Lord Justice Matthew? or Lord Justice Henn Collins to be Master of the Rolls? I maintain that a man should aspire to rise as high in the service of his country as his merits will allow him to do. Any other policy is a blighting and withering one, which would deprive the state of its chiefest ornaments. Is it easy under present conditions to get the best men to accept seats on the Bench? And are, under those conditions, good Judges so common that their country can afford to keep them down? A Judge may be prepared to give up all prospect of extra remuneration or benefit from commissions, or arbitrations, or directorships,

pressed in the CANADIAN LAW TIMES for October last (wherein is given his address to Mr. Justice Perdue) and in his article in the same number entitled "Jobs for Judges." And there are articles to the same effect in the *Canadian Law Review* for September, p. 681, and in the *Canada Law Journal* for September, p. 539, and October, p. 602, which give similar and additional reasons for these conclusions. Not only on the grounds mentioned by Mr. Ewart is a continuation of the practice as regards commissions plainly undesirable from a purely public point of view, which is of primary importance, but also for a further reason very aptly stated by the *Canada Law Journal* for October, at p. 602, as follows:—

"Another matter, which perhaps more affects the relation between the Judges themselves, is that the absence of one Judge on extra-judicial work throws an unfair burden on his brethren. This, moreover, is apt to delay litigation, and causes the not unnatural remark that more Judges would not be required if they were all engaged in their legitimate duties."

So even from this, so to speak, domestic aspect, the public is directly concerned, for it has to pay for the extra Judge to make up for those whose energies are misdirected into other channels.

Since I was appointed to the Bench, over five years ago, I have sat on one commission (to settle conflicting mining claims) and have felt it my duty to refuse to sit on one other, or to act as arbitrator for public bodies or private persons. It is true that all commissions are not of the same nature, and one kind is not open, in the opinion of some at least, to the same objections, so far as the primary effect on the general public is concerned, i.e., the revision of statutes as mentioned by the *Canada Law Journal* (September, p. 539).

or railway passes, but he should not be asked to abandon all hope that ability and faithful discharge of duty will be eventually recognized by his fellow countrymen. That expectation, remote though it be, is an additional incentive to sound and faithful work, and there is no fear, if a Judge is worthy to sit on a Bench at all, of its affecting his independence, because, if he does his duty, independence is one of the most essential and unmistakable characteristics of that duty, without which he could not hope to become meritorious.

Nevertheless even such revising is objectionable, primarily domestically, and ultimately publicly, for the reasons stated in the extract above quoted. And I think a Judge who revises a statute is hampered in arriving at a proper conclusion should he be called upon to construe it.

After full reflection, I have come to the conclusion that if a Judge acts on any commission (other than international) it has directly or indirectly, publicly or domestically, an undesirable effect on the administration of justice and is contrary to the welfare of the State, and even if I were again to get the opportunity (and I am not likely to after publishing this letter), I should refuse to sit unless it became my plain duty to do so by virtue of some statutory direction.

As Mr. Ewart says, absolute independence of thought and action is essential to a Judge, and it is idle to say, such is the frailty of human nature, that a poor man is not at least unconsciously affected to some degree and in some direction, be it more or less, by the prospect of easily adding to his admittedly inadequate salary, say \$1,000, \$2,000, \$3,000, or possibly more, for aught I know. Now the vast majority of Judges are poor men, who have nothing but that same inadequate salary (*b*) to live on (let me here disarm criticism on this point by saying that I am one of that majority), and it is manifest that such a man cannot, especially if a father, lightly put aside the prospect of a handsome and speedy increase to his income, hampered as he is by the growing needs and education of a family and the struggle to reasonably preserve the status of a dignified office in the manner expected of him in these spacious and expensive days of 1903, on the salary which was deemed to be, and was, fairly adequate in the relatively simple times of 1867.

Under such circumstances, and to prevent his independence being laid open to suspicion, all temptations in the nature of commissions, railway passes, and directorships (in regard to which I shall speak later), ought to be removed

(*b*) Eked out, it may be in some cases, by a variable and uncertain circuit allowance which (at least in this Province of great distances and often rough accommodation) is hard earned.

from his path. It should be said of every Judge, as it was of that judicial paragon Lord Chief Justice Hale, not only that "he constantly shunned the being corrupt, but everything which had any appearance or might afford the least suspicion of it."

In making the above statements I wish it to be distinctly understood that nothing is further from my intention than to reflect on the manner in which any of my learned brothers has conducted himself on any commission: it is principles, not individuals, that I am discussing, and it is, in my opinion, fit and proper that the views of the Bench on this grave question should be made public, otherwise a false impression might be gathered regarding their general attitude thereto.

As to railway passes, I do not hesitate to say that in my opinion it is a highly improper thing for any Judge to accept them: so improper, that it is a grave accusation against a Judge to allege it. At the same time, I am well aware that it is generally believed that Judges accept them, but I shall not assume that any member of the Bench does so till the fact is established. There are Judges I know who have persistently refused them and returned them to the senders. And steamship passes are, of course, in the same category as railway passes, and of these latter I am in a special position to speak, because, as Judge of the Admiralty Court for this great maritime Province, as well as a member of the Supreme Court thereof, the whole shipping interest of British Columbia is, in case of marine litigation, within my jurisdiction, and so perhaps I am as well qualified to hold views on the subject of free judicial transportation as any of my learned brothers in Canada. Be it clearly understood that the acceptance of a pass for one's self or the members of one's family is not "a mere compliment," as it is sometimes gracefully and airily designated, but a substantial gift, worth, in some instances that I could name, several hundred dollars. According to my way of looking at it, a Judge who sits on a case with a pass from the defendant company in his pocket, occupies somewhat the same position as did those now historic "impartial jurists of repute" (!) from the United

States who sat on a recent Commission, and, after declaring, before their appointment, that Canada had no rights, gravely proceeded to adjudicate (?) upon that which they had already determined had no existence.

As regards directorships of public companies generally, such as insurance, trust, land, financial, and others, I am of the opinion that Judges should not accept them, whatever is the practice in other countries. It is not seemly that a Judge should occupy what is in the public eye considered to be the equivocal position of a "guinea-pig," glorify it as you may. Some very few Judges do it, but again I say I have known Judges who have refused such offers, though probably they needed and still need the income that could have been so derived more than those who have accepted them. I have the best reasons for knowing that such alluring offers have been made simply for the purpose of obtaining the Judge's name.

Of course, such is the dangerous laxity of the times, even as regards the fountain of justice, there is a certain, and not very small, portion of the community which, with that inclination to shift and shirk responsibility which is so marked a feature of our day, views the whole matter in an easy going manner somewhat as follows: "Well, the Judges are paid so badly that we don't grudge them any outside advantage which they may derive from this office." But I wish to protest vigorously against the adoption of such a low standard and such a degradation of the office, so contrary to every principle on which it is founded. Judges should receive remuneration from one source only, and that is from Parliament (c).

It follows that those Judges who will not increase their income from extra-judicial sources are placed at a considerable pecuniary disadvantage, and, if they have no private means, must, to take one illustration only, deny themselves and their families the more attractive and expensive holiday

(c) Except, of course, the results of literary labours; though my experience has been that it is much easier to get complimentary reviews from editors than cash from publishers.

journeys indulged in by their friends and associates in the same social degree, and either stay at home or be content with the nearer and cheaper resorts, consoling themselves, doubtless, with the reflection that it is better to stay at home with their self respect than go away on a pass and leave it behind.

So far I have been viewing the matter mentioned from the higher plane only, and on that plane I take my stand, and feel sure that the overwhelming majority of my learned brothers will stand with me. But I suppose there must, even on this question, being a big one, be a minority, however small, and that some will not agree with all the principles so sought to be laid down. To these, then, I say that, viewing it as a matter of mere policy, all judicial commissions, arbitrations, passes, and directorships should be done away with, because the existence of them now stands as a substantial barrier to the re-adjustment of the salaries of the judiciary to meet the times. The popular idea is that by such means the stipends of Judges as a class are very considerably increased, whereas the fact is that only a very small percentage profit by them. Nevertheless, the production of a receipted bill in Parliament, or its publication in the press, shewing that so many thousand dollars have been paid to Mr. Justice Blank as a remuneration for sitting on the So-and-So Commission, confirms the lay mind in that perhaps pardonable, though erroneous, belief, with the result that much unnecessary and unreasoning, but comprehensible, opposition has to be overcome by those who are willing and anxious to deal fairly with the Bench in the matter indicated. And is it not rather hard on the majority that because they take a higher view of their office their income is lower than that of the minority?

What, then, it will be asked, on the whole matter, ought to be done? The practical answer has already been furnished by Senator Ferguson in his speech on his Bill on the subject in the Senate, and by the *Canada Law Journal* (p. 602), and it is this:

“The simple business proposition is to pay Judges handsomely for the very important work which properly belongs to their office, and let them do that and nothing else.”



This letter, I am afraid, has attained an unexpected length, but the importance of the subject justifies its full consideration. I shall conclude by saying, as has been said in one of the above citations, that it is fortunate we have in the present Minister of Justice one who takes a high view of the judicial standard, and will, we may be sure, do everything possible to see that it is maintained.

I am, Sir,

Very faithfully yours,

ARCHER MARTIN.

Law Courts, Victoria, B.C., November 10th, 1903.

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**A Correction of a Nova Scotia Judgment—*Rex v. McDonald*.**

*Editor, CANADIAN LAW TIMES:*

SIR,—Before the current volume of your valuable journal is completed, I should like to correct some of the data, etc., which form the basis of the judgment in *Rex v. McDonald*, reported in full on pp. 95 and 96 of the Occasional Notes in this year's *TIMES*.

The Judge (Meagher, J.), who spoke for the Court in banco here, has stated the facts somewhat incorrectly (of course unintentionally so), although counsel at the time of the argument laid the very full information disclosed by the affidavits before the Court, and impressed their importance on that tribunal as far as he was able.

The facts were as follows: My client, Mr. McDonald, was convicted before the police magistrate for the town of Westville of a first offence against the second part of the Canada Temperance Act, on the 22nd February, 1901. A writ of certiorari was allowed on motion of other counsel than myself, by the learned Chief Justice on the 15th March, 1901, to remove this conviction into the Supreme Court of Nova Scotia. A return to the writ was made on the 23rd March, 1901, but no motion was ever subsequently made to quash the conviction, through the inadvertence of the counsel who

procured the writ, a fact undoubtedly overlooked, though it was brought to the attention of the Court, notwithstanding that the judgment states that "no reasons were given to account for the delay." On the 23rd September, 1902—more than a year after the return to the writ—the prosecutor gave a notice of motion for the ensuing November term of the Court in banco to quash the certiorari, on the ground that the defendant had not moved to quash the conviction within a year after its removal (*Regina v. Rines*, 17 N. S. Reps. 87; *Halifax v. Vibert*, 3 R. & C. 54); and in that he was guilty of laches, etc., without, however, having first given us the month's notice of intention to proceed, as required by Crown Rule 188. This Rule is as follows: "In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether prosecutor or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. A summons of a Judge on which no order has been made, shall not be deemed a proceeding within this Rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it."

I then came into this matter for the first time, and the full Court, on preliminary objection and governed by a previous decision of its own, referred to in the judgment I am now correcting, dismissed the prosecutor's motion *without costs*, under an order dated the 10th December, 1902, although the defendant had done nothing improper to disentitle him to costs, and though under Crown Rule 191 these costs are *not* in the discretion of the Court. This Rule, which governs this case, is as follows: "In all cases not specially provided for, the unsuccessful party shall pay costs unless the Court or a Judge shall otherwise order."

The prosecutor was further indulged by this order with leave to move again, and the Court, when asked, declined to give any reason for depriving us of costs, although Rule 22 of Order 63 reads as follows: "When any unsuccessful party is deprived of any costs by any order or judgment of the Court, or a Judge, *the reason* for so depriving such party

of any such costs shall be expressed in and by such order or judgment." The italics are mine. Their Lordships orally held that the word "Court" means "Trial Court" and not the "Court in banco," a distinction, I venture to think, under the circumstances, hardly in line with the decisions on this word rendered by the Courts in England.

The prosecutor and the defendant, in order to place themselves *recti in curia*, were now obliged to give each a month's notice to the other of intention to proceed to *quash the certiorari* and to *quash the conviction* under Crown Rule 188 above mentioned. This they each did shortly after the date of the above order, and they would each then be entitled to make their respective motions some time after the 25th January, 1903. But a notice of motion to quash a conviction, under the Nova Scotia practice, as laid down in Crown Rule 164, has to be entered on the docket for argument, and as an entry would at the time we were entitled to move be too late for the January term, 1903, the last entry date of that term being the 6th January, the earliest possible moment at which the defendant could make this entry would be on the 3rd March, 1903, he having under Crown Rule 161 up to the 27th February, 1903, during which to give a notice of motion to *quash the conviction*. After these two last mentioned dates, and not before, I respectfully submit, under these circumstances should the defendant be said to be *now* in default, and liable to have his writ of certiorari quashed. Yet the prosecutor, after his own notice of intention to proceed had placed *him* properly before the Court, virtually took the defendant by the throat and made a motion (immaturely, I think) before the Court in banco on the 7th February, 1903, to quash the writ of certiorari, which, as a matter of common fairness, I regret to say prevailed, as reported, *with costs*.

It is not, I would think, ideal justice, and may be doubtful law, I most respectfully and deferentially say, that enables one of the parties, to the exclusion of the other, to take advantage of a Rule that is framed for the benefit of both, such as is Rule 188 above mentioned. The prosecutor

was as much in default as the defendant for not having taken a proceeding within the year, as required by this Rule; in order to have been regularly before the Court at all times, and to be without the necessity of invoking Rule 188, as he ultimately had to do, he should have given a notice of motion to quash the certiorari after the 3rd March, 1902, and before the 23rd March, 1902, which time would be *after* the last entry day on which the defendant could have entered his motion to quash the conviction within the year allowed him for so doing by the practice of the Nova Scotia Courts and set out in the cases above cited. The prosecutor would then be *within his year* in so moving, while we would be *without* ours. But both parties were out of Court, and for that equally blameworthy, and on ordinary principles both should then have received the same treatment. A more liberal construction of the Rules and a fairer application of the existing practice would have secured this.

I wish to add that the defendant's solicitor never "gave notice of a motion to be made at the coming March term to quash the conviction," as stated in the opinion, although it was our intention to have done so, after I had taken hold of the matter for the defendant. The only notice given by us was a notice under Crown Rule 188 of intention to proceed to give a notice of motion to quash the conviction; and the last judgment of the Court prevented us from giving any other.

No appeal lay to the Supreme Court of Canada from either of these above judgments and orders, and of course none was taken.

The above is a full abstract of my argument, that I placed, without effect, before the Court on both motions.

Yours truly,

JOHN J. POWER.

Halifax, N.S., Nov. 4th, 1903.

## CURRENT PERIODICALS.

**The Virginia Law Register** for October has a leading article on "Subsequent Birth of Children as a Revocation of a Will," by Marvin H. Altizer.

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**The Columbia Law Review** for November contains the following papers, among others: "New Trials for Erroneous Rulings upon Evidence," by John H. Wigmore; "The Tubwomen v. the Brewers of London," by William A. Purring-ton; "The Steel Corporation Cases," by James F. Tracey.

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**The Green Bag** for November has a number of short articles, among them "A Story of a Rural Shire," by Hale K. Darling, and "A Bungled Affair," by H. Gerald Chapin.

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**The Law Magazine and Review** (Quarterly) for November supplies a continuation of "Specific Performance," by Mr. Rawlins, K.C., and a very interesting and able paper on "Lord Chancellor Loughborough," by Mr. J. A. Lovat-Fraser.

## BOOK REVIEWS.

**Williams on Vendor and Purchaser:**—A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real, intended for the use of conveyancers, by T. Cyprian Williams, Barrister-at-law, assisted by J. F. Iselin, Barrister-at-law. London: Sweet and Maxwell, Limited: 1903.

The work is in two volumes, and the first only is now given to the reader. The work is inscribed by the author to the memory of his father and master in the law, the late Joshua Williams. The design is to discuss the incidents of a contract for the sale of land as they are usually presented to the notice of conveyancers. In the first volume the reader is conducted throughout the whole of the normal course of a contract for the sale of land. In the second volume the parties' position after completion will be treated. The volume before us will, we think, prove very satisfactory to Canadian readers. It may properly be commended as a scientific and scholarly presentation of an important branch of the law, worthy to rank with the elaborate treatises of Lord St. Leonards and Mr. Dart.

**Quebec Fish and Game Laws:**—A digest of the whole law, Dominion and Provincial, in force on the 30th October, 1903. By A. H. O'Brien, M.A., Barrister-at-law. Toronto: The Canada Law Book Co.: 1903. (Cloth 50 cents, paper 25 cents.)

A companion volume to the Ontario Fish and Game Laws, noticed ante p. 433. A very useful little book.

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OF CANADIAN CASES REPORTED AND  
NOTED DURING THE YEAR 1903,

DECIDED IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, IN  
THE SUPREME AND EXCHEQUER COURTS OF CANADA,  
AND IN THE COURTS OF ALL THE PROVINCES,

AND

A BRIEF SUPPLEMENTARY DIGEST OF CASES DECIDED BY THE  
COURT OF APPEAL AND HIGH COURT OF JUSTICE FOR ONTARIO,  
DURING THE YEAR 1903, AND REPORTED IN VOLUME II.  
OF THE ONTARIO WEEKLY REPORTER,

TOGETHER WITH

TABLE OF THE CASES DIGESTED  
*(With References also to the Occasional Notes for 1903.)*

AND A TABLE OF THE CASES AFFIRMED, FOLLOWED, ETC., IN THE  
CASES DIGESTED.

---

EDITED BY

**EDWARD B. BROWN, B.A.,**  
*Of Osgoode Hall, Barrister-at-Law.*



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THE CARSWELL CO., LIMITED, 30 ADELAIDE STREET EAST,  
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# THE CANADIAN LAW TIMES.

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## OCCASIONAL NOTES.

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### ERRATUM.

In *Hargrave v. The King*, 22 Occ. N. 427-8, the counsel should be: *Travers Lewis*, for the suppliant, and *F. H. Chrysler*, K.C., for the Crown.

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### Exchequer Court of Canada.

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[BURBIDGE, J., 5TH DECEMBER, 1902,

#### DOMINION IRON AND STEEL CO. v. THE KING.

*Crown—Bounties on manufacture of "pig iron" and steel—Statutes—Interpretation.*

It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the art of manufacturing iron and steel the term "pig iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether the iron when so used in a liquid or molten form was "pig iron" within the meaning of the term as employed in 60 & 61 V. c. 6 and 62 & 63 V. c. 8:—*Held*, that the term "pig iron" in the Act mentioned applied to the iron used in the manner described, and that a manufacturer of steel ingots therefrom was entitled to the bounty provided by the said Acts in respect of the manufacture of such iron.

PETITION OF RIGHT for bounties on the manufacture of pig iron and steel.

The facts are stated in the reasons for judgment.

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The case was heard at Sydney, Nova Scotia, and at Ottawa, on the 26th and 27th August and the 28th to 31st October, 1902.

*F. H. Chrysler*, K.C., and *W. B. Ross*, K.C., for the suppliant.

*A. B. Aylesworth*, K.C., and *C. A. Moss*, for the Crown.

BURBIDGE, J.:—"The petition in this case is filed to recover the sum of \$196,967.15 for bounties on pig iron and steel ingots manufactured by the suppliants, which they claim to be entitled to by virtue of the provisions of the Acts of Parliament 60 & 61 V. c. 6, and 62 & 63 V. c. 8, and of the regulations made under such Acts. The defence is that a portion of the iron on which the bounty is claimed was used in a molten or liquid state for the manufacture of steel ingots, and that in this form it was not pig iron within the meaning of the statutes referred to.

The first Act passed in Canada to encourage the manufacture of pig iron to which my attention has been called was passed in the year 1883. By this Act (46 V. c. 14) the Governor-in-Council, under regulations to be made by him, was authorized to pay out of the consolidated revenue fund a bounty on all pig iron manufactured in Canada between certain prescribed dates, the bounty to be \$1.50 per ton where the pig iron was made from Canadian ore, and in other cases \$1 per ton. By 49 V. c. 38 the time within which such bounties could be earned was extended. In 1890 the bounty on pig iron manufactured from Canadian ore was increased to \$2 per ton (53 V. c. 22). Up to this time the bounties were offered to encourage the production in Canada of pig iron, and especially of pig iron manufactured from Canadian ore. In 1894 a further step was taken, and bounties were offered for the manufacture in Canada of iron and steel from Canadian ore. By the Act of that year, 57 & 58 V. c. 9, the Governor-in-Council was authorized to pay a bounty of \$2 per ton on all pig iron made in Canada from Canadian ore, and a like bounty on puddled iron bars made in Canada from Canadian ore, and on steel billets manufactured in Canada from pig iron made in Canada from Canadian ore and such other ingredients as were necessary and usual in the manufacture of such steel billets, the proportion of such ingredients to be regulated by order of the Governor-in-Council. By s. 2 of the Act it was provided that in the case of the products of furnaces then in operation the bounties should be applicable only to such products as were manufactured therein between 27th March, 1894, and 26th March, 1899; and that in the

case of any furnace which should commence operations there-after and before 27th March, 1899, such bounties should be applicable to the products manufactured therein during a period of five years from the date of commencing operations. None of these statutes is directly in issue in this case, but they have been mentioned to shew what preceded the statutes on which the question to be determined turns, and as shewing a general intention of Parliament during the years mentioned, not only to stimulate the production of pig iron by furnaces then in existence, but to encourage the erection of other furnaces for that purpose and for the purpose of manufacturing such pig iron into puddled iron bars and steel billets.

Coming now to the first of the two statutes under which the present claim arises, it will be seen that by s. 1 of the Act (60 & 61 V. c. 6) it is provided as follows:—

“1. The Governor-in-Council may authorize the payment of the following bounties on steel ingots, puddled iron bars, and pig iron made in Canada, that is to say:—

On steel ingots manufactured from ingredients of which not less than fifty per cent. of the weight thereof consists of pig iron made in Canada, a bounty of \$3 per ton;

On puddled iron bars manufactured from pig iron made in Canada, a bounty of \$3 per ton;

On pig iron manufactured from ore, a bounty of \$3 per ton on the proportion produced from Canadian ore, and \$2 per ton on the proportion produced from foreign ore.”

Section 2 of the Act prescribed the time within which such steel ingots, puddled iron bars, and pig iron should be made in order that the bounty might be earned; and s. 3 gave the Governor-in-Council authority to make regulations in relation to such bounties and to carry out the intention of the Act. By 62 & 63 V. c. 8, the time mentioned in s. 2 of 60 & 61 V. c. 6 was extended, and a gradually diminishing scale of bounties prescribed; and it was also provided that no bounty should be paid on steel ingots made from puddled iron bars manufactured in Canada. A bounty could be earned on pig iron, and then on either puddled iron bars or steel ingots made therefrom; but the manufacturer could not earn a third bounty by making the puddled iron bars into steel ingots. In the manufacture of iron and steel from the ore two bounties, but not three, might be payable with respect to the same material in a different form or state of manufacture. The regulations made by the Governor-in-Council respecting the payment of such bounties are in evidence, but no question arises thereon which does not equally arise upon the statutes under which they were made, and it is not necessary to refer more particularly to their provisions.

The company have, at Sydney, Cape Breton, four blast furnaces for the manufacture of pig iron, and an open hearth steel plant consisting of ten "H. H. Campbell Tilting Open Hearth Furnaces" for the manufacture of steel. The construction of these furnaces was commenced in the year 1899, and they have since been completed at a great cost and are now in operation. Part of the product of these blast furnaces is cast in a sand bed in the usual way; part is run in moulds that form what is called the pig machine; and a part is conveyed in a molten or liquid state from the blast furnaces to the steel mill and is there poured into a mixer or reservoir for holding this liquid metal, and from which a supply is drawn whenever a charge is required for one of the steel furnaces. The liquid metal is taken from the blast furnaces to the reservoir in large ladles set on tracks, and moved by an engine on an ordinary railway truck. While in these ladles the metal is weighed. That may be and is done with convenience and accuracy. This practice of taking the metal in a liquid state from the blast furnaces direct to the steel plant was not in 1899 or in 1897 a new practice or process in the manufacture of steel from pig iron. As shewn by Mr. Chrysler, the practice has been followed for a number of years in almost every country in which iron and steel are manufactured. It has been followed in the United States, in Great Britain, in Sweden, in Germany, in Belgium, in France, in Austria, in Hungary, in Russia, in Syria, and in Japan. And, although this practice has in general been adopted only in cases where the blast furnaces and steel plant were under the same management, the evidence discloses a few instances in which a manufacturer of pig iron has sold part of the product of his furnaces to another manufacturer of iron or steel and delivered it to him in a molten or liquid state. Of course that is only possible within limits. The blast furnaces and the steel plant must be near enough to each other to permit of the ladles being moved from the one to the other without giving the metal time to cool.

There is no controversy about that portion of the product of the company's furnaces that is cast in the sand bed or run into the pig machine. The question in issue is raised in respect of the metal that is taken in a liquid state from the furnaces to the reservoir or mixer. As to that it is argued for the respondent that this metal in this state or condition is not pig iron within the meaning of the statutes that have been referred to; and that no bounty is payable in respect thereof or in respect of the steel ingots manufactured therefrom. That is the question to be determined.

But before coming directly to that question, it may perhaps be found convenient to refer to some rules that have been

laid down to guide in the construction of terms occurring in Acts of Parliament. And with respect to statutes generally I do not know that I could do better than to adopt the language used in *Maillard v. Lawrence*, 16 How. 261, where it is said that the popular or received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions, and wherever the Legislature adopts such language to define and promulgate its action or its will, the just conclusion must be that it not only comprehended the meaning of the language it has selected but has chosen it with reference to the known apprehension of those to whom the language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. That is a general rule. But in the case of tariff laws it has been held that in imposing duties the Legislature must be understood as describing the articles upon which the duty is imposed according to the commercial understanding, in the markets of the country, of the terms used in the statute. The commercial designation, the use of the term by merchants and importers, is in such cases the first thing to be ascertained. See *Arthur v. Morrison*, 96 U. S. R. 108; *Robertson v. Salomon*, 130 U. S. R. 413; *Nix v. Hedden*, 149 U. S. R. 304. And where a term has not acquired any special meaning in trade or commerce, it is to be taken and received in its ordinary meaning in the common language of the people. In the present case, we have to deal with statutes that must, I think, be taken to be addressed in the first instance to manufacturers of iron and steel. It is to them that the bounties prescribed are offered. And while persons engaged in other branches of the same industry or in other industries, as well as the community at large, have an interest in the matter, it does seem that any inquiry that would leave out of account the meaning attributed by such manufacturers to the terms used in such statutes would be incomplete and might be misleading.

Pig iron is the product of a blast furnace used for the purpose of reducing iron ores. It contains, among other things, a larger proportion or percentage of carbon than either steel or puddled iron bars. And one of the principal objects to be attained in the manufacture of steel ingots or puddled iron bars from pig iron is to get rid of this excess of carbon. The term "pig iron" was derived from the shape which the iron assumed in the sand beds in which it was first cast; and when first used had reference no doubt to a particular shape or form. It has since acquired a larger meaning, and as used at present includes, it is conceded, any product of the blast furnace that is cast in any convenient form or shape without reference to what that form or shape

may be. So far the parties to the present controversy are agreed. It has also happened that among ironmasters and those who are familiar with the processes by which iron ores are reduced and made into pig iron and then manufactured into wrought iron or steel, the term "pig iron" has come to mean and include as well that substance in a molten or liquid state, it being usual to prefix to that expression some adjective such as "molten" or "liquid" when the speaker or writer wishes to distinguish between solid pig iron and liquid pig iron. But, as, in the nature of things, difficulty and expense are involved in maintaining iron in a liquid state, and as there is in general no object in overcoming the difficulty or incurring that expense except for an inconsiderable length of time, most men see pig iron in a solid form; and that form is in general necessary to the handling of it as an article of trade and commerce. So it must, I think, be conceded that in common speech the term "pig iron" carries with it the meaning of something that is solid and not liquid. If one turns to the dictionaries to ascertain the meaning of the term, he will, I think, come away from the inquiry with the same impression. That of course may be because one lexicographer follows another, and does not make the original research into the modern literature of the subject that Mr. Chrysler has with such great industry made. Of the result of his researches, of which I have had the advantage, it is not possible, with fairness to his argument and a proper regard for brevity, to make any present use further than to say that I do not think any one sitting down to make a new dictionary from original sources, and reading the extracts that Mr. Chrysler read, would adequately interpret the term "pig iron" if he failed to make it clear that the term is now, and has for a considerable number of years been, used in a sense that includes that metal in a liquid as well as in a solid state. And if the only question were whether the metal which the company used in a liquid state for the manufacture of steel ingots was or was not pig iron, there could, I think, be only one answer to the question, and that is, that it was pig iron. But the question is somewhat narrower than that. Perhaps it would be more exact to say that there are two questions, and that one of them is narrower than that stated. With regard to the bounty on steel ingots, this may be the question: Were or were not the steel ingots in question made from pig iron? With regard to the bounty on pig iron, the question is not perhaps whether liquid pig iron is pig iron, a question that suggests its own answer, but whether it is pig iron on which a bounty is payable under the statute? The steel ingots in question were undoubtedly steel ingots within the meaning

of that term as used in the statute. There is no dispute about that; and they were manufactured from ingredients of which not less than fifty per cent. of the weight thereof consisted of something made in Canada, and, when one asks what that something was, there is only one answer possible, namely, that it was pig iron used in a molten or liquid state, but none the less pig iron; for as to that there is nothing to suggest that it can make any difference in what form or condition the pig iron was when so used. If the pig iron as it came from the blast furnace had been allowed to cool, it would have been necessary to melt it before it could be used in the further process of making steel. If it were suggested that the manufacturer who uses the liquid metal for making steel has an advantage over one who is not in a position to do so, and that the latter would for that reason be placed in respect of the bounty in a position of inequality, the answer is, that the statute does not disclose any intention on the part of Parliament in any way to equalize the conditions under which different manufacturers would earn the bounties in question. I do not know that any one could properly attribute any intention to Parliament, except that it was its intention to encourage the manufacture in Canada of pig iron, puddled iron bars, and steel ingots; and the erection in Canada of furnaces and mills in which these things would be produced. But if one were to go beyond that and speculate as to matters not appearing upon the face of the statute, it would, I think, be reasonable to conclude that Parliament intended (if as to that it intended anything) to encourage the erection of furnaces and mills using the most modern, efficient, and best appliances and processes known to the trade or business. But for myself I am not sure that Parliament intended anything more than to leave each manufacturer to carry on his own business and to earn the bounty in his own way. All I do say is, that I do not see anything in the statute to lead me to the conclusion that Parliament intended to handicap progress and economy in the art of making iron and steel by withholding the bounty on steel ingots manufactured from liquid pig iron in the manner described.

But when one has said that the company have earned and are entitled to the bounty on the steel ingots that they have made from such pig iron, it does not follow as a matter of course that they have also earned and are entitled to the bounty on the pig iron itself. That, as has been stated, raises in some of its aspects a different question. The pig iron, the product of the blast furnace, is as much pig iron while it is in the blast furnace as it is when it has been run off into the ladles; but no one would suggest that the manufacturer could, with any hope of succeeding, say to the

Governor-in-Council, here are my blast furnaces full of pig iron, pay me the bounty on that pig iron. The answer would no doubt be, if it is pig iron it is not in the state or condition in which a bounty is payable on it. Something more must be done. The amount of the bounty is to be determined by reference to the number of tons of pig iron produced. The pig iron must be weighed. It must also, I think, be something that can be used. Not that anyone to earn the bounty must make use of it, but no bounty is, it seems to me, payable in respect of any pig iron that cannot be put to some use. That ought, I think, to be implied. The bounty is payable on pig iron manufactured in Canada from ore. The pig iron must be weighed before any bounty is payable, and it must be in a state or condition in which it can be used. These, it seems to me, are the conditions to be observed to entitle the manufacturer to this bounty. Have the suppliants observed them? I think they have. As stated, the material produced is pig iron. There is no difficulty in weighing it while in the ladles. It has in fact been carefully weighed. In the molten state in which it then was it was fitted for one of the uses pointed to in the statute itself, namely, the manufacture of steel ingots. It was used for that purpose, and in my judgment the company are entitled to the appropriate bounty prescribed by the statute.

But before leaving the subject I ought to add that I have not overlooked two arguments against the view that I have expressed, to which I have as yet made no reference. It is said that in the earlier statutes, when the bounty was confined to pig iron, that term meant what was known generally and commonly as pig iron, and possibly that may be so. And then it is said that the same term used in the later statutes must be taken to have the same meaning and not a wider one. Some weight is no doubt to be given to that consideration, but it is not conclusive. Other considerations are involved. Then it is said that the term used in the French version of the statute, namely "*le fer en gueuse*," shews that it was the intention of Parliament to confine the bounty to pig iron having some shape; and that, if it had been its intention that it should also be payable on pig iron used in a liquid state for the manufacture of puddled iron bars or steel ingots, there was not wanting a more appropriate term, such as "*le fer fondu*," to give expression to that intention. That, too, is an argument entitled to consideration, but, again, it is not conclusive, if, as I think, the larger meaning is to be gathered from the statute as a whole. And as to that it does seem to me that Parliament was dealing with a substance or material, and was not particularly concerned with its shape or form or condition, so long as it was pig



iron and could be weighed and put to some use; and with respect to the uses to which it could be put a special encouragement by way of bounty was offered to any manufacturer who would use it to manufacture, in Canada, steel ingots or puddled iron bars, and I do not think that it was intended to draw any distinction between its use in a solid or in a liquid state.

The suppliants are, in my opinion, entitled to the relief sought by the petition. The amount claimed is, as stated, \$196,967.15, and no question was raised as to the amount. But that an opportunity may be given to make that matter more certain, if there is any question about it, the judgment will be entered for the sum mentioned, and costs, with leave to either party to move to strike out the sum so stated and to substitute therefor such an amount as the company may on further inquiry be found to be entitled to.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[24TH NOVEMBER, 1902.]

MORRISON v. GRAND TRUNK R. W. CO.

*Discovery—Examination of officer of railway company—Engine-driver—  
Rules 439, 461 (2).*

*Held*, reversing the decision of a Divisional Court, 4 O. L. R. 43, 22 Occ. N. 162, that inasmuch as the engine-driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control, conduct, and management of the train in such a way as to make him responsible to the defendants except for the management of his engine, he was not an officer of the company examinable for discovery under Rule 439; MACLENNAN, J.A., *dubitante*.

Speaking generally, the officer of the corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of

which the action arises, would *prima facie* be the proper officer to be examined in the first instance under Rule 439.

*D. L. McCarthy*, for the defendants, appellants.

*J. G. O'Donoghue*, for the plaintiff, respondent.

✓  
DIVISIONAL COURT.]

[24TH NOVEMBER, 1902.]

TORONTO GENERAL TRUSTS CORPORATION v. WHITE.

*Landlord and tenant—Valuation of buildings—Extension of time for making award—Interest.*

By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuers or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuers or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the land and buildings was given up by the lessees to the lessors on the 31st October, 1900.

*Held*, OSLER, J.A., *dubitante*, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent. and for the remainder of the time at the legal rate of five per cent.

Judgment of a Divisional Court, 3 O. L. R. 519, 22 Occ. N. 178, varied.

*J. Bicknell*, K.C., for the appellants.

*F. E. Hodgins*, K.C., for the respondents.

LOUNT, J.]

[24TH NOVEMBER, 1902.

## UNION BANK OF CANADA v. RIDEAU LUMBER CO.

*Trespass—Cutting and removing timber—Measure of damages—Wrongful and wilful acts.*

In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed.

Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only:—

*Held*, that the damages should be measured by: (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants; (3) such further and other damage as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc.

*Martin v. Porter*, 5 M. & W. 351, and *Bulli Coal Co. v. Osborne*, [1899] A. C. 351, applied and followed.

Decision of LOUNT, J., 22 Occ. N. 114, 3 O. L. R. 269, affirmed.

*W. M. Douglas*, K.C., and *J. F. Smellie*, for the plaintiffs.  
*G. F. Henderson*, for the defendants.

## HIGH COURT OF JUSTICE.

[STREET, J., BRITTON, J., 15TH NOVEMBER, 1902.

## BIRNIE v. TORONTO MILK CO.

*Company—Appointment of manager by directors—Want of by-law and seal—Services rendered—Salary—Compensation.*

The plaintiff was appointed by the board of provisional directors of a company to be a director, and was also appointed manager at a salary before the company was organized. In an action for salary or compensation for services rendered, in which it was shewn that the services rendered had not

resulted in any benefit to the company, and that the company had never gone into operation:—

*Held*, that, as he was not appointed by by-law approved of by the shareholders, and had no contract under seal, he could not recover.

*In re Ontario Express and Transportation Co.*, 25 O. R. 587, commented on.

Judgment of LOUNT, J., reversed.

*J. B. O'Brian*, for the defendants.

*J. M. Godfrey*, for the plaintiff.

[MEREDITH, C.J., MACMAHON, J., 12TH DECEMBER, 1902

MONRO v. TORONTO R. W. CO.

*Practice—Stay of reference pending appeal—Rules 826, 827, 829—Ruling of Master in Ordinary—Appeal from—Forum.*

A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826.

*Held*, that the reference was stayed pending the appeal.

Construction and application of Rules 827 and 829.

The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in s. 75 (2) of the Judicature Act, R. S. O. 1897 c. 51; and an appeal from his ruling lay to a Judge in Court.

*J. Bicknell*, K.C., for the defendants.

*W. N. Ferguson*, for the plaintiff.

[FALCONBRIDGE, C.J., STREET, J., 15TH DECEMBER, 190

HOLMES v. TOWN OF GODERICH.

*Municipal corporations—Borrowing powers—"Ordinary expenditure"—School purposes—Costs.*

The power conferred upon a municipality by the Municipal Act, R. S. O. 1897 c. 223, s. 435, of borrowing money to

meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality, apart from the expenditure for school purposes.

Where this limit had been exceeded, but before the action was tried the money had been repaid, the plaintiff, who sued on behalf of himself and all other ratepayers, was held entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality.

Judgment of ROBERTSON, J., reversed.

*W. Proudfoot*, K.C., for the appellant.

*E. L. Dickinson*, for the respondents.

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[BOYD, C., 17TH NOVEMBER, 1902.]

✓ FARLEY v. SANSON.

*Landlord and tenant—Lease—Renewal—Arbitration—Lessee naming arbitrator under protest—Landlord appointing sole arbitrator.*

The lessee under a renewal lease contended that he was not obliged to take a renewal, and wished to have this point settled before arbitrating to fix a renewal rent. The lessors, however, urged on the preliminaries for having arbitrators appointed, and to this the lessee responded by naming an arbitrator under protest so as to save his rights in regard to his contention. The lessors refused to accept this nomination, and proceeded to appoint a sole arbitrator, as though the lessee had made no appointment.

*Held*, that the lessors had no power thus to appoint a sole arbitrator; and an injunction was granted restraining them from proceeding before such sole arbitrator.

The arbitration might have proceeded in the ordinary form of three arbitrators notwithstanding the protest of the plaintiff, who might in the end have had the benefit of his legal objection.

*T. D. Delamere*, K.C., for the plaintiff.

*A. E. O'Meara*, for the defendants.

[FALCONBRIDGE, C.J., 9TH DECEMBER, 1902.]

*In re* BERGMAN v. ARMSTRONG.

*Bankruptcy and insolvency—Assignments and preferences—Declaration of right to rank—Division Court.*

An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R. S. O. 1897 c. 147, is not within the jurisdiction of a Division Court.

W. H. Blake, K.C., for the defendant.

W. Davidson, for the plaintiff.

[STREET, J., 21ST NOVEMBER, 1902.]

BLACK v. IMPERIAL BOOK CO.

*Copyright—Foreign reprints—Imperial Copyright Act, 1842, s. 17—Imperial Customs Law Consolidation Act, 1876, ss. 42 and 152—Notice to commissioners of customs—Statement of wrong date of expiration of copyright.*

The result of the legislation contained in ss. 42 and 152 of the Imperial Customs Law Consolidation Act, 1876, and s. 17 of the Imperial Copyright Act, 1842, is, that in order to entitle the proprietor of copyright in a book to enforce his rights in regard to foreign reprints of it, he is required to give the notice prescribed by s. 152 of the former Act, to the commissioners of customs, besides registering the work at Stationers' Hall; and until he has complied with both of these formalities he has no rights which he can enforce with regard to imported reprints.

*Held*, also, that in this case the notice required by s. 152 of the former Act had not been given, inasmuch as, in a notice which had been given in pretended compliance with the section, the date when the copyright would expire in the case of the book in question, being the 9th edition of the Encyclopædia Britannica, had not been correctly stated.

In the case of such a work as the Encyclopædia Britannica, the duration of the copyright of the actual authors of the various articles is seven years from death in each case, or forty-two years from the first publication, whichever shall be the longer period, and the only actual date which can be fixed

as the date of the expiration of the copyright would be forty-two years from the registered date of the publication of the first number of the Encyclopædia.

*W. Barwick, K.C., and J. H. Moss, for the plaintiffs.*

*S. H. Blake, K.C., and W. E. Raney, for the defendants the Imperial Book Co.*

*A. Mills, for the defendant Hales.*

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### IN CHAMBERS.

[MEREDITH, C.J., 17TH NOVEMBER, 1902.]

#### SHANTZ v. TOWN OF BERLIN.

*Jury notice—Striking out—Judge in Chambers—Common law action—Nuisance—Injunction—Damages.*

Motion to strike out a jury notice in an action for an injunction to restrain a nuisance in the shape of a sewage farm, and for damages.

*Held*, this not being an action which prior to the Administration of Justice Act, 1873, was cognizable by the Court of Chancery, that the jury notice could not be set aside as irregular by the Common Law Procedure Act. Long prior to the Administration of Justice Act, 1873, the common law Courts had power to grant an injunction in a case such as this.

While, no doubt, a Judge sitting in Chambers has power, in the exercise of his discretion, to strike out a jury notice in an action such as this, although the party requiring a jury may *prima facie* be entitled to it, the practice is not to exercise that power but to leave it to be dealt with by the trial Judge.

*C. P. Smith, for the defendants.*

*E. E. A. DuVernet, for the plaintiffs.*

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[MACMAHON, J., 18TH NOVEMBER, 1902.]

#### *In re* McKENZIE.

*Will—Construction—Annuities—Creation of fund for—Right to resort to corpus.*

The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue

of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each one of my sisters . . . \$250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill health or misfortune a greater sum than the others, and a greater sum than \$250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . . whatever may remain of the estate."

*Held*, that the sisters of the testator had the right to resort to the corpus of the fund provided for the payment of their annuities, if the income was insufficient.

*Mason v. Robinson*, 8 Ch. D. 411, and *Illsley v. Randall*, 50 L. T. N. S. 717, followed.

*A. H. Marsh*, K.C., for the annuitants.

*E. D. Armour*, K.C., for the specific and residuary legatees.

*J. R. Meredith*, for the executors.

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[STREET, J., 26TH NOVEMBER, 1902.]

*In re PINK.*

*Will—Construction—Inconsistent bequests—Reconciling—Formal bequest of residue.*

A testator bequeathed all his clothing, wearing apparel, and personal effects to his brother; all his household furniture and other personal property to his sister; he then devised to his sister for life all his real estate, with remainder in fee to his nephew, subject to certain legacies and annuities which he charged upon it; and wound up his will by devising and bequeathing the rest and residue of his real and personal property to his nephew.



At the time of his death the testator's personal property consisted of: household goods and furniture, \$150; farming implements and live stock, about \$500; book debts and promissory notes, \$35; cash, \$273; wearing apparel, watch, chain, etc., \$25; total, \$983.

*Held*, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personalty; the nephew taking none of it.

The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form.

*W. F. Kerr*, for the executors and the sister.

*B. Morton Jones*, for the brother.

*F. W. Harcourt*, for the nephew, an infant.

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## NOVA SCOTIA.

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### In the Supreme Court.

[FULL COURT, 1ST DECEMBER, 1902.]

NORTON v. NORTON.

*Husband and wife—Divorce—Alimony—Evidence of husband—Admissibility.*

This was an appeal from the decision of the Judge of the Court of Divorce and Matrimonial causes. The Judge refused to receive the evidence of the respondent, the husband, on the question of alimony, and the respondent appealed.

*R. T. McIlreath*, for the appellant.

*McInnes*, contra.

THE COURT held, following the decision in *Corkum v. Corkum* (unreported), that the respondent was not a competent witness.

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[FULL COURT, 6TH DECEMBER, 1902.]

REX v. McDONALD.

*Certiorari—Motion to quash for want of prosecution—Necessity for notice to proceed.*

Rule 188 of the Crown Rules (Nova Scotia) directs that in all causes in which there have been no proceedings for one

year from the last proceeding had, the party, whether prosecutor or defendant, who desires to proceed, shall give one calendar month's notice to the other party of his intention to proceed. The defendant, pursuant to the order of a Judge, removed a conviction made by a magistrate into the Court, and took no further steps in the matter. The informant moved to quash the *certiorari* on the ground that no steps had been taken by the defendant for upwards of a year.

*Held*, that the informant must first give one month's notice of intention to proceed.

*Chisholm*, for the informant.

*Power*, for the defendant.

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[MEAGHER, J., 18TH JULY, 1902.]

### CALDER v. M. AND V. B. B. W. CO.

*Trespass—Injunction—Entry to build road before land expropriated by municipality of town—Statutes.*

This action was brought to restrain the defendants from building a railway across the plaintiff's lands, and to recover damages for trespass.

The defendants were incorporated by c. 82 of the Acts of the Province of Nova Scotia for 1897, s. 38 of which provides: "The lands required by the company for track or station purposes for the line of railway, sidings, stations, and wharves and piers, shall be a county charge, and be payable by the county through which the line of railway passes, subject, however, to resolution of the municipal council of the said county, authorizing the acquisition of said lands."

The proposed line lay wholly within the county of Annapolis. The town of Bridgetown was incorporated on the 15th September, 1897, after the Act was passed, and the town lay in the proposed course of the railway. On the 23rd October, 1900, the county council passed the following resolution: "Ordered that a free right of way and lands necessary for railway purposes from Victoria Beach to Middleton, in the county of Annapolis, be granted to the Granville and Victoria Beach Railway and Development Company, Limited, said right of way to be paid for on the completion of said line of railway." In December, 1901, the town council of the town of Bridgetown called a meeting of ratepayers to vote the defendants a free right of way through the town,

and the meeting passed a vote that the company have a free right of way through the town. The town council thereupon had an Act passed, being c. 62 of the Acts of 1902, authorizing the town to expropriate the necessary lands, and providing for entry thereon upon payment or tender of the compensation awarded by arbitrators. The Provincial Railway Act is quite similar to the Dominion Railway Act, but the former provides, by s. 164, that where the charter makes the cost of the right of way a charge upon any municipality, it shall not be necessary for the company to expropriate, and there is no provision for the company to enter before the municipality has expropriated.

The plaintiff owned land within the town of Bridgetown, and the defendants entered and began to build their road thereon, before any steps had been taken to expropriate.

The plaintiff moved on notice before MEAGHER, J., for an interim injunction restraining the defendants from entering until the lands had been expropriated and the compensation paid.

*F. L. Milner*, for the plaintiff.

*O. T. Daniels*, for the defendants.

MEAGHER, J.:—The plaintiff seeks an order to restrain the defendants from further interfering with, or trespassing upon, his lands in the town of Bridgetown.

I have reached the following conclusions:—

First, that the defendants, if the matter rests upon the provisions of c. 99 of the Revised Statutes, the Nova Scotia Railways Act, other than those contained in s. 164, were not, under the facts of the case, entitled to enter upon the plaintiff's land at all, and were therefore trespassers.

Second, that s. 164 of that statute has no application to the present case. But, even if it did apply, it would not assist the defendants, because it does not confer upon them any other or greater rights in respect to entering upon or taking possession of or acquiring title to the plaintiff's lands than those created by other provisions in that statute in relation to lands the price for which is not made a charge upon the municipality through which the railway passes.

Third, that s. 164 does nothing more than prescribe the mode in and the manner by which the compensation for land required for tracks, etc., is made a charge upon the municipality through which the railway passes.

Fourth, that c. 62 of the Acts of 1902, being the later enactment and a special one, governs, and therefore, under

s. 4 thereof, the defendants had no right to enter upon the plaintiff's land until the title thereto (at the least) was acquired by the town of Bridgetown through expropriation proceedings taken by it under the Towns' Incorporation Act. The course taken by the defendants—not having given the plaintiff notice under the Railway Act—indicates that they regarded the situation in the same light as I do.

Fifth, that such town, under the combined operation of c. 62 of the Acts of 1902, and the Towns' Incorporation Act, could not acquire title to lands expropriated under the latter, nor become the owner thereof, nor take possession itself, nor give to the defendants the right to do so, until the provisions of s. 211 of the latter statute were complied with, viz., upon payment or tender to the owner or to the prothonotary of the county of the sum awarded as compensation to the owner.

Sixth, that no proceedings to expropriate were taken under the Railway Act at any time, and effective proceedings have not been taken to vest the plaintiff's land, or the right to enter into possession of it, in the town or in the defendants, under the Towns' Incorporation Act.

Seventh, that the town cannot be regarded in this connection as forming any part of the municipality of the county of Annapolis, and therefore any proceedings by the latter cannot be called to the defendants' aid.

In the determination of the question whether this is a proper case for awarding the relief sought, the fact that the acts of the defendants which are complained of were illegal, and in that sense arbitrary, is entitled to considerable weight.

Some very considerable delay may, and I think must, necessarily intervene before the plaintiff can receive his compensation for the land in question, through the agency of the town of Bridgetown. Meantime he is out of possession and deprived of the use and enjoyment of his land. I cannot conclude that there is any provision in any statute applicable to the plaintiff's case, as between him and the town (and the defendants rely wholly upon the latter to acquire title to his land and to pay therefor) which in any way authorizes payment beyond the mere value of the land as compensation.

If this is the correct view, and I am persuaded that it is, especially if the provisions of the Towns' Incorporation Act govern, and material delay should intervene, a thing not unlikely to happen, the plaintiff could not recover, either through the medium of an award or by other legal proceedings, damages for the loss of the use of his property in the

interval between the time at which the defendants took exclusive possession thereof and the time when the plaintiff received the amount awarded to him. Neither could he recover interest upon the award.

In this view the plaintiff would be injured in a manner and to an extent for which he could not get redress except through this action, if at all.

When money is paid into Court under the Railway Act, six months' interest is required to be added, but there is no corresponding provision in the Towns' Incorporation Act, which provides (s. 43) only for the payment into Court of the sum awarded.

The defendants could not, in my opinion, reasonably have considered that they had a right, under the facts in proof, to enter upon the plaintiff's land. I therefore feel myself compelled to conclude that the trespasses were wilful as well as illegal. Kerr on Injunctions, at p. 118, points out that the principles upon which the Court acts in restraining trespasses on the part of companies of this character, differ in some respects from those upon which it acts in restraining trespasses by individuals, and that a private person who seeks to restrain a company from entering illegally upon his lands, is not required to make out a case of destructive trespass or irreparable damage.

After referring to several considerations such as: (1) the inability of private persons to contend with these powerful companies which are often too prone to act in an arbitrary and oppressive manner, and which in itself raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers; (2) that the company must prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise; (3) that if a doubt exists as to such power that doubt must be for the benefit of the land-owner, and should not be solved so as to give the company any power not clearly and expressly defined by the statute; (4) that a man has a right to say that the company shall not affect his land by stirring one step out of the exact limits prescribed by the statute, and if they do the Court will at once interfere; and (5) that the principle upon which the Court interferes is not so much the nature of the trespass as the necessity of keeping such companies within control—this author says: "The Court has not only jurisdiction to interfere to restrain a company from affecting a man's land by stirring out of the exact limits prescribed by the statute which gives them authority, but is almost bound to interfere, and will, as a matter of course, interfere unless the damage," etc., etc.

In this case the matter of damage does not fall within the qualification stated in the addition to the text just quoted, especially having regard to what I have said at an earlier stage. I refer also to the observations of Lord Hatherley, in *Stretton v. Great Western R. W. Co.*, L. R. 5 Ch. 751 and 23 L. T. N. S. 379: "And when the persons employed by the company come *vi et armis* to deprive him of his right, what could he do but file his bill to restrain them? It is not contrary to the course of the Court to grant relief in such cases, and the Court has often, in the case of railway companies, granted relief to prevent their violent user of those powers with which the Legislature has clothed them, and has taken care to do that which was right between the parties."

*Bygrave v. Metropolitan Board of Works*, 32 Ch. D. 147, 54 L. T. N. S. 889, was an action for specific performance of a contract for the sale to defendants of plaintiff's title to land. An order was made by a Judge to let defendants into possession on payment into Court of the whole purchase money with interest. On appeal the order was discharged. The only controversy in the action was whether the title—a leasehold one—was determinable at the end of seven or fourteen years by notice. This case shews the strictness with which the Courts guard private rights even against a public company with none but public duties to perform.

*O. T. Daniels*, for the defendants.

See Cripps on Compensation, pp. 53 and 94, and Abbott's Railway Law, pp. 216, 217.

The plaintiff was rightfully in possession when the defendants forcibly invaded his premises. He is therefore entitled to retain his possession until it is decided in due form of law that some other person is entitled to it.

The defendants might easily have avoided the difficulty which has arisen in this case, and I am therefore less disposed to help them carry out their illegal methods successfully.

The restraining order will accordingly pass.

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[TOWNSHEND, J., 12TH NOVEMBER, 1902.]

CALDER v. M. AND V. B. R. W. CO.

*Judgment—Confession of defence arising after action—Judgment for costs—Waiver of other defences.*

The plaintiff brought an action against the defendants for (1) damages for trespass, and (2) an injunction restrain-

ing the defendants from further trespassing. An interim restraining order was granted (see preceding case). The defendants pleaded a defence justifying the entry under the statutes referred to in the previous judgment, and the plaintiff joined issue. Subsequently the town of Bridgetown expropriated the plaintiff's land for the use of the defendants. The restraining order was thereupon discharged by consent. The defendants then obtained leave to plead, and pleaded that since the commencement of the action the town of Bridgetown had expropriated the plaintiff's land, etc., etc., and had paid him the damages awarded, and "that said award included all damages done to the plaintiff's land by the defendant company as well as all the trespasses, acts, and grievances, complained of in the plaintiff's statement of claim." The plaintiff confessed this defence, and entered judgment for his costs to be taxed. The defendants moved to set aside the judgment.

*F. L. Milner*, for the plaintiff.

*O. T. Daniels*, for the defendants.

TOWNSHEND, J.:—I have looked into the various cases cited, and have to observe that most of them are decided on the peculiar facts then before the Court. In this case the action was for a trespass for the act of the defendant company's workmen in illegally entering upon the plaintiff's land. The object of the action was damages, and the subsequent defence rests on payment of these damages after action brought by the town of Bridgetown, which the plaintiff confessed. I am of opinion that from the very nature of this subsequent defence it necessarily operates as a waiver of the previous grounds, and it is not a case in which I would otherwise order. Under any circumstances, I would not set aside the judgment or order the cause to go to trial, unless the defendants agree to withdraw their subsequent defence. It would be futile to do so, as the only purpose of the action was to recover the damages, which, as the defendants subsequently pleaded, have already been paid and accepted in full.

There is no question remaining here to be tried as in *Houghton v. Tottenham and Forest Gate R. W. Co.*, [1892] W. N. 88, where North, J., compelled the plaintiff to go to trial. Of course it may be urged that the same course should be pursued in this case as in *Bridgetown Waterworks Co. v. Barbados Water Supply Co.*, 38 Ch. D. 378, 59 L. T. N. S. 314, but I cannot consider that the circumstances here justify me in compelling the plaintiff to go through a useless trial.

I therefore come to the conclusion that this motion should be refused, and with costs.

## IN CHAMBERS.

[WEATHERBE, J., 2ND DECEMBER, 1902.]

## ATTORNEY-GENERAL v. CITY OF HALIFAX.

*Gift—Breach of contract—Attempted breach—Injunction—Municipal corporation—Ratepayer—Attorney-General.*

On the 4th February, 1902, Andrew Carnegie made an offer to the city of Halifax that "if the city will pledge itself by resolution of council to support a free public library at a cost of not less than \$7,000 a year, and provide a suitable site," he (Carnegie) "will be glad to furnish \$75,000 to erect a free library building." The city corporation obtained legislation (Acts of 1902 c. 44, s. 6) enabling them to give the guarantee, and afterwards passed a resolution accepting Carnegie's offer and giving the guarantee, which resolution was communicated to Carnegie, and the receipt thereof acknowledged by him. At a later meeting of the city council, a resolution was passed to rescind all previous resolutions of council in relation to the matter. Thereupon this action was commenced by the Attorney-General, on the relation of a ratepayer, for an injunction to restrain the city from taking any further action in breach of the contract with Carnegie, and a motion was made for an interim injunction.

*Harrington, K.C., and Russell, K.C., for the plaintiff.*

*McCoy, K.C., and Ritchie, K.C., for the defendants.*

WEATHERBE, J., held, that there was a binding contract between the city of Halifax and Mr. Carnegie (*Williams College v. Donforth*, 12 Pick. 54), and the Court ought to interfere to restrain a breach of the contract. The Attorney-General is properly a plaintiff: *Daniel's Ch. Prac.* 50; *Stoke Parish Council v. Price*, [1899] 2 Ch. 277; *Attorney-General v. London County Council*, [1902] A. C. 165. It is a question for the Attorney-General himself to determine whether he shall intervene. The smallness of the interest of the party seeking relief must not operate to prevent an injunction where there is a breach of covenant. Besides, the passing of the statute has given a vested interest to every citizen. The injunction must be continued.



## MANITOBA

## In the King's Bench.

[FULL COURT, 20TH DECEMBER, 1902]

## ROYLE v. CANADIAN NORTHERN R. W. CO.

*Railways—Crossing—Private "trail"—Highway—Omission to give statutory warning—Contributory negligence.*

County Court appeal. The plaintiff sued for injuries received by him in driving across the defendants' line through collision with a train. The plaintiff admitted that the crossing where he was struck was not a legally dedicated public highway, but he contended that it was used and treated as a highway by the public; that the defendants knew it and were bound to ring the bell or sound the whistle of their trains before passing the crossing; and that by their failure to do so they were liable.

The crossing was not on any road allowance authorized by statute or recognized by the municipality, but there was a trail there used by farmers living in the vicinity.

The occupier of the land where the trail crossed the railway never gave permission to the plaintiff nor to any one else to use the crossing, but he knew the trail was used by the public and he never objected. There was no resolution of the municipality for the expenditure of money for road purposes on that section of land; the secretary stated he never heard of a roadway there; though statute labour was performed on the grading of the trail up to the crossing.

The action was tried by jury, and at the close of the trial several questions were submitted to the jury, who answered them, but gave no formal verdict. The Judge subsequently gave judgment for the plaintiff upon the findings of the jury.

*Held*, that the trail in question did not come within the definition of "highway" in the Railway Act, 1888, s. 2 (g). It could not be said that it existed by prescription, it was not authorized by Act of Parliament or municipal by-law, and it had never been dedicated to the use of the public. The occupier of the land said he considered the trail his property. The plaintiff stated that when he went over the crossing he was not going much faster than a walk, but he was not thinking of trains; he knew it was a dangerous place. Unless a person was on the track he could not see a coming train.

There was contributory negligence on the plaintiff's part and he could not recover: *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100.

*G. A. Elliott*, for the plaintiff.

*J. H. Munson*, K.C., and *A. B. Hudson*, for the defendants.

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[FULL COURT, 20TH DECEMBER, 1902.]

DAVIDSON v. MANITOBA AND NORTH-WEST LAND CORPORATION.

*Principal and agent—Commission—Payment promised by purchaser to agent but never received—Right of deduction by principal.*

An appeal from the decision of KILLAM, C.J., 22 Occ. N. 305, was dismissed with costs, RICHARDS, J., dissenting.

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[BAIN, J., 15TH NOVEMBER, 1902.]

MAW v. MASSEY-HARRIS CO.

*Patent for invention—Infringement—Domicil of patentee—Service out of jurisdiction—Application to set aside.*

Appeal from an order of the referee setting aside the service, out of the jurisdiction, of the plaintiff's amended statement of claim on the Verity Plow Company and one Vansickle.

The action in the first place was brought against the Massey-Harris Company, who were duly served within the jurisdiction, and the plaintiffs, alleging that the company were selling certain ploughs in infringement of patents belonging to them, asked for damages and an injunction against further infringement. The Massey-Harris Company in their statement of defence alleged that the ploughs in question were purchased by them from the Verity Plow Company in Brantford, Ontario, and that that company were duly manufacturing and selling the ploughs under certain patents issued to Vansickle, and assigned by him to the company. Thereupon the plaintiffs amended their statement of claim by adding the Verity Plow Company and Vansickle as defendants; and, besides asking for damages and an injunction against the defendants, they alleged that the invention patented by Vansickle had been appropriated by him from the plaintiff Hancock, and asked that the patent should be declared null and void.

Both the Verity Plow Company and Vansickle were out of the jurisdiction; it was not alleged that either of them had been or was doing anything as to which an injunction could be asked against them in Manitoba; and it was on the ground that they were proper and necessary parties to the action against the Massey-Harris Company (Rule 196 (g)) that the plaintiffs relied, on moving to set aside the referee's order. The Massey-Harris Company, they contended, justified under the patent; the plaintiffs impeached the validity of the patent; and the holders of the patent must therefore be before the Court.

*Held*, that the appeal must be dismissed with costs.

On the allegations in the statement of claim the only relief the plaintiffs could have against the Massey-Harris Company would be an injunction and damages. There was no allegation that the Verity Plow Company and Vansickle had done anything in Manitoba which infringed the plaintiffs' patent, or which could entitle the plaintiffs to an injunction or damages against them, and the only relief which could be obtained against them would be that their patent should be declared void. There were thus two distinct and independent causes of action.

Ontario was the domicile which Vansickle elected in his application for the patent. Under the Patent Act, R. S. C. c. 61, as amended by 53 V. c. 13, this Court had not jurisdiction to impeach the patent.

*F. H. Phippen* and *G. D. Minty*, for the plaintiffs.

*J. A. M. Aikins*, K.C., and *H. Robson*, for the Verity Plow Co. and Vansickle.

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[RICHARDS, J., 19TH NOVEMBER, 1902.]

### BLAKESTON v. WILSON.

*Contract—Suit before completion of—Arbitration—Application to make award a judgment of the Court—"All matters in dispute"—Some not considered by arbitrators—Delegation of powers.*

The plaintiff sued to recover a balance upon a contract for the erection of a building by the plaintiff for the defendant.

After the record had been entered for trial, the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the named ones, "all matters whatsoever in dispute" between the plaintiff and defendant.

The two named arbitrators and a third one appointed by them took upon themselves the burden of the reference, heard evidence, and made an award in writing by which they found

that the defendant was indebted to the plaintiff in the sum of \$362.55; that the defendant might retain \$110 of this balance 30 days for the plaintiff to complete his contract in a workmanlike manner. Should the plaintiff decline to complete the work the \$110 to be forfeited to the defendant. Should the defendant decline to allow the plaintiff to complete the building, the defendant should pay the \$110 at the expiration of 30 days from the date of the award. Each party to pay his own costs.

The plaintiff moved under Rules 754 to 764 of the King's Bench Act to have the award made a judgment of the Court. The defendant opposed the motion.

*Viva voce* evidence was taken, as provided for by the Rules. One of the arbitrators was called as a witness, and admitted that there were certain matters in dispute between the parties which were not considered by the arbitrators.

*Held*, that the award was bad. The plaintiff sued on an alleged completed contract, not claiming to be entitled to payment before such completion. The evidence shewed the contract price to be at least the chief ingredient in the \$362.35 found by the award to be due from the defendant to the plaintiff. But the award shewed on its face that the contract had not been completed. Therefore, the plaintiff was not entitled to recover the contract price or any part of it.

Though the reference was one of "all matters whatsoever in dispute," the evidence shewed that the arbitrators in making the award omitted to take into consideration matters so in dispute, though they knew of them. Such omission invalidated the award: *Bowes v. Fernie*, 4 My. & Cr. 150; *Wilkinson v. Page*, 1 Hare 276.

The award also was defective in that, without power given them to do so, the arbitrators attempted to delegate to another person, (and that an unascertained person) their authority to decide whether \$110 of the amount awarded should or should not be paid: *Tandy v. Tandy*, 9 Dowl. 1044.

Motion refused with costs.

*F. S. Andrews*, for the plaintiff.

*T. H. Johnson*, for the defendant.

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[RICHARDS, J., 19TH NOVEMBER, 1902.]

### FOX v. ALLEN.

*Contract—Action for threshing wheat—Defence that wheat not properly measured or weighed—Weights and Measures Act—Powers of appellate Judge.*

County Court appeal. The plaintiff sued defendant on an account consisting of three branches:—

Threshing .....	\$313 61
Man at straw, 1 day .....	1 50
Moving threshing outfit .....	10 50
	<hr/>
	\$325 61
By credits .....	224 28
	<hr/>
Balance .....	\$101 33

If the wheat were clean, the defendant was to pay car measurement; if the wheat were not clean, he was to pay for the threshing by the bag measurement. The oats were measured by the bag. The foreman did not, in so many words, say that the wheat was measured by the bag, but the inference was that it was.

The defendant denied the debt, alleged that he had satisfied the plaintiff's claim before action, and added, "I also plead the Weights and Measures Act, R. S. C. c. 104, as a bar to this action." The principal contention at the trial was as to whether or not the Weights and Measures Act was sufficiently pleaded.

RYAN, Co.J., was of opinion that it was, though he thought a fuller statement of the ground relied upon advisable; he was also of opinion that, notwithstanding the admission of the quantities admitted by defendant in an exhibit filed, as having been threshed, the Weights and Measures Act prevented a recovery for the threshing; he held that he could not properly or legally refuse to acknowledge the validity of the defence, but to accentuate his opinion of its injustice he refused to allow the defendant any costs. Judgment for defendant without costs.

The plaintiff appealed.

*T. G. Mathews*, for the plaintiff.

*J. A. M. Aikins*, K.C., and *H. Robson*, for the defendant.

RICHARDS, J.:—There was no conflict of evidence. Therefore, following *Creighton v. Pacific Coast Lumber Co.*, 12 Man. L. R. 546, 19 Occ. N. 285, this seems a case of the class in which on an appeal the appellate Judge must follow his own views as to the conclusions to be drawn from the statements of the witnesses. After careful consideration of the evidence and of the judgment of the full Court in *Hughes v. Chambers*, 14 Man. L. R. 163, 22 Occ. N. 333, I differ with much deference from the view taken by the learned Judge who tried the action, and feel at liberty to draw conclusions which it seems to me that he would have drawn, if he had felt free to do so, and which I cannot but think he would have felt free to draw if *Hughes v. Chambers* had come to his notice. . . . There is no express testi-

mony as to how the wheat was measured. The learned trial Judge has held that he must infer that it was measured by the bag. I am unable to agree that such conclusion should be drawn where it would enable the defendant to evade his debts. In *Hanbury v. Chambers*, 10 Man. L. R. 167, 14 Occ. N. 321, followed in *Hughes v. Chambers*, it was held that the facts upon which such a defence as that here set up is based, must be proved fully, and that in the absence of such full proof no inference will be drawn that would help the defendant to commit a wrong.

Exhibit 1 filed credited plaintiff with the threshing of 4,597 bushels of wheat. Coming from the defendant that statement was an admission that the plaintiff threshed for the defendant that quantity of wheat, for which threshing the plaintiff was to be paid by the defendant. In the absence of express evidence that the measurements were illegally made, the inference should be that they were legally made. As the defendant has not proved a defence, under the Weights and Measures Act, to the plaintiff's claim for threshing, the plaintiff should recover.

Appeal allowed with costs, judgment in County Court set aside, and judgment to be entered there in favour of the plaintiff against the defendant for \$47 with costs.

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[RICHARDS, J., 20TH NOVEMBER, 1902.]

### HENRY v. BEATTIE.

*Fire insurance—Application made to agent—Gross negligence on his part in not sending application to company—Liability of agent.*

The plaintiff was a girl of about 14; W. G. Henry, her uncle, had stood in *loco parentis* to her since childhood. In and prior to December, 1900, the defendant was, and still remained, an agent for the Hamilton Provident and Loan Society and for the Royal Insurance Company; he had signs on his office holding him out to the public as a fire insurance agent. W. G. Henry formerly owned land in Manitoba, which he mortgaged to the Hamilton Provident Society; the defendant knew of the mortgage; Henry afterwards erected buildings on the land and conveyed it to the plaintiff, subject to the mortgage. In December, 1900, Henry, who was unable to read or write, except to sign his name, went to the defendant's office to apply for insurance for three years on the buildings.

The defendant took a form of application for insurance furnished him by the Royal Insurance Company, and filled

it up, getting the necessary information from Henry, who signed it, and paid him \$20 premium. The loss was to be payable to the loan company as collateral to their mortgage. The defendant stated that he intended to send the application to the Hamilton Provident Society to enable them to effect the insurance. The defendant told Henry that the insurance had been effected, and that the loan company held the policy. In July, 1902, some of the buildings were burned; it then transpired that the Hamilton Provident Society had never received the application or effected the insurance, and that no insurance had been effected on the burned buildings.

Nothing was shewn as to what became of the application after Henry signed it. The defendant stated that, as there were contra accounts between him and the Hamilton Provident Society, he kept the premium and used it for himself, intending that the company should advance the amount to the insurance company, and debit such payment to him.

One witness valued the buildings at \$300, two others at \$400.

*Held*, that there should be judgment for the plaintiff for \$350 and costs, with a certificate for costs on the King's Bench scale, and without set-off of costs by the defendant.

As the defendant received the application, it lay on him to shew what he did with it. In the absence of such shewing, it should be found that he did nothing with it; that being so, a case of gross negligence had been made out against him, which he had failed to meet; the defendant led Henry, the plaintiff's agent, to believe that the insurance had been effected, and he was guilty of gross negligence in omitting to insure as agreed.

*D. A. Macdonald and J. D. Hyndman*, for the plaintiff.

*E. Anderson and H. Ormond*, for the defendant.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 29TH APRIL, 1902.]

#### MARINO v. SPROAT.

*Appeal—Introducing fresh evidence on appeal—Practice.*

Motions by the appellants to admit in the full Court further evidence on the hearing of appeal from a judgment at the trial were dismissed.

*Held*, that an application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant indicating the evidence desired to be used, and setting forth when and how the applicant came to be aware of its existence, what efforts, if any, he made to have it adduced at the trial, and that he is advised and believes that if it had been so adduced, the result would probably have been different.

*Davis*, K.C., and *S. S. Taylor*, K.C., for the motions.

*Duff*, K.C., and *John Elliot*, contra.

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[FULL COURT, 7TH OCTOBER, 1902.]

CANE v. MACDONALD.

*Partnership—Salary of one partner as government architect—Right of co-partner to share in—Receiver book debts.*

Appeal from judgment of MARTIN, J., refusing to appoint a receiver.

While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary.

C. sued for a declaration that he was entitled to half the salary since the dissolution, and asked that a receiver be appointed of it, and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for.

*Held*, by the full Court, that no receiver of the salary could be appointed; that, although the amount of the book debts was small, there should be a receiver in respect to them.

Judgment varied by appointing receiver of partnership assets other than the salary; costs of motion below and of appeal reserved for trial Judge.

*Per* Hunter, C.J., at the trial:—Even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the salary after the dissolution of the firm, unless there was a special agreement to that effect.

*E. P. Davis*, K.C., for the appellant.

*L. P. Duff*, K.C., for the respondent.



## Supreme Court of Canada.

EXCHEQUER COURT.]

[9TH MAY, 1902.

### DOMINION COAL CO. v. THE "LAKE ONTARIO."

*Ship—Collision—Ship at anchor—Anchor light—Lookout—Weight of evidence—Credibility—Findings of trial Judge—Negligence.*

Judgment appealed from, 7 Ex. C. R. 403, affirmed.

*Mellish*, for the appellants.

*Newcombe*, K.C., and *Drysdale*, K.C., for the respondent.

[18TH MAY, 1902.

### THE "PAWNEE" v. ROBERTS.

*Ship—Collision—Undue speed—Ship in default—Rule 16—Navigation during fog.*

Judgment appealed from, 7 Ex. C. R. 390, 22 Occ. N. 129, varied; *GIROUARD*, J., dissenting.

*C. J. Coster*, for the appellant.

*H. H. McLean*, K.C., for the respondent.

[10TH NOVEMBER, 1902

### ROSS v. THE KING.

*Revenue—Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption as to good faith.*

The Crown is not liable, under the provisions of Arts. 1047 and 1049, C. C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act.

*Wilson v. City of Montreal*, 24 L. C. Jur. 222, approved.

*Per STRONG*, C.J. (dubitante).—The error of law mentioned in Arts. 1047 and 1049, C.C., is the error of the party

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paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those Articles.

*Toronto Railway Co. v. The Queen*, 4 Ex. C. R. 262, 25 S. C. R. 24, [1896] A. C. 551, discussed.

*Algoma Railway Co. v. The King*, 7 Ex. C. R. 239, referred to.

Judgment appealed from, 7 Ex. C. R. 287, 22 Occ. N. 86, affirmed.

*Campbell*, K.C., and *I. F. Hellmuth*, K.C., for the appellants.

*Fitzpatrick*, K.C., A.-G., and *Newcombe*, K.C., for the Crown.

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[18TH NOVEMBER, 1902.]

REX v. CHAPPELLE.

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REX v. CARMACK.

REX v. TWEED.

*Mining law—Royalties—Dominion Lands Act—Publication of regulations—Renewal of license—Payment of royalties—Voluntary payment—R. S. C. c. 54, ss. 90, 91.*

The Dominion Government, by regulations made under the Dominion Lands Act, may validly reserve a royalty on gold produced by placer mining in the Yukon, though the miner, by his license, has the exclusive right to all the gold mines; *TASCHEREAU* and *SEDGEWICK, JJ.*, dissenting.

The "exclusive right" given by the license is exclusive only against quartz or hydraulic licenses or owners of surface rights and not against the Crown; *TASCHEREAU* and *SEDGEWICK, JJ.*, dissenting.

The provision in s. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the Canada Gazette means that the regulations do not come into force on publication in the last of the four successive weeks of the Gazette, but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of the 4th September, they were not in force until the 11th, and did not affect a license granted on the 9th September.

Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.

One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year."

*Held*, reversing the judgment of the Exchequer Court, 7 Ex. C. R. 414, SEDGEWICK, J., dissenting, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he was subject to the terms of any regulations made since such grant was issued.

The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.

Regulations in force when a license issued were shortly afterwards cancelled by new regulations imposing a smaller royalty.

*Held*, that the new regulations were substituted for the others and applied to said license.

*Fitzpatrick*, K.C., A.-G., and *H. S. Osler*, for the appellant.

*E. D. Armour*, K.C., and *J. Travers Lewis*, for the respondents.

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ONTARIO.]

[12TH MARCH, 1902.]

### CHALLONER v. TOWNSHIP OF LOBO.

*Drainage—Qualification of petitioners—"Last revised assessment roll"—Costs of non-appealing party.*

Judgment appealed from, 1 O. L. R. 156, 292, 21 Occ. N. 108, 201, affirmed.

Appeal dismissed with costs to respondents the township of Lobo, but without costs to the respondent Oliver.

*A. B. Aylesworth*, K.C., for the appellant.

*G. F. Shepley*, K.C., and *Talbot Macbeth*, K.C., for the respondents the township corporation.

*H. A. Burbidge*, for the respondent Oliver.

[7TH OCTOBER, 1902]

## WESTERN BANK v. MCGILL.

*Promissory note—Duress—Verdict of jury.*

In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager.

*Held*, that the jury having believed the defendant's account and given him a verdict, which the evidence justified, such verdict ought to stand.

Judgment of Court of Appeal (16th October, 1901, unreported) affirmed.

*W. Cassels*, K.C., and *C. A. Jones*, for the appellants.

*C. J. Holman*, K.C., and *H. L. Drayton*, for the respondent.

[8TH NOVEMBER, 1902.]

## TRUSTS AND GUARANTEE CO. v. HART.

*Gift—Undue influence—Confidential relations—Evidence—Parent and child—Public policy—Principal and agent.*

The principle that, where confidential relations exist between donor and donee, the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by shewing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for the benefit of the latter's children, when the son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later, and by voluntarily paying it before he died, such presumption does not arise.

Judgment of the Court of Appeal, 2 O. L. R. 251, 21 Occ. N. 493, reversing that of a Divisional Court, 31 O. R.

414, 20 Occ. N. 65, affirmed; SEDGEWICK and DAVIES, JJ., dissenting.

Wallace Nesbitt, K.C., and E. M. Young, for the appellants.

A. B. Aylesworth, K.C., and W. Davidson, for the respondents.

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QUEBEC.]

[9TH JUNE, 1902.]

WARD v. TOWNSHIP OF GRENVILLE.

*Negligence—Vis major—Driving timber—Servitude—Watercourses—Floatable rivers—Statutory duty—Riparian rights.*

The Rouge river, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down saw-logs to booms, in which the logs are collected at the mouth of the river, and distributed among the owners. The plaintiffs constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive, and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The river Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam, and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally:—

*Held*, affirming the judgment below, STRONG, C.J., and SEDGEWICK, J., dissenting, that, irrespective of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused.

*Held*, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right but an easement or privilege which must be enjoyed and exercised with such care, skill, and diligence as may be necessary to

prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses.

*Atwater*, K.C., and *Campbell*, K.C., for the appellant.

*Lafleur*, K.C., and *DeLaronde*, for the respondents.

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[9TH OCTOBER, 1902.]

ROUSSEAU v. BURLAND.

*Title to land—Interdiction—Marriage laws—Authorization by interdicted husband—Dower—Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation by interdict.*

The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed, and must also contain a description sufficient to identify the lands sought to be affected.

A sale by the sheriff, under execution against a debtor in possession of an immovable under apparent title, discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of Art. 2116, C. C.

*Per TASCHEREAU, J.*:—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can, on any ground whatever, attack a title for which such vendor has given warranty.

*Semble*, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity, and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization.

Judgment below affirmed.

*Larochelle*, for the appellants.

*Aime Geoffrion*, for the respondent.

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[10TH OCTOBER, 1902.]

CAMPBELL v. YOUNG.

*Evidence—Parol testimony—Commencement of proof in writing—Admissions.*

Where a contract is admitted to have been entered into by the party against whom it is set up, no commencement

of proof in writing is necessary in order to permit of the adducing of evidence by parol as to the amount of the consideration or as to the conditions of the contract.

In such a case, the rule that admissions cannot be divided against the party making them does not apply.

Judgment of the Court below reversed.

*Stuart*, K.C., for the appellant.

*L. P. Pelletier*, K.C., and *Hogg*, K.C., for the respondents.

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[6TH NOVEMBER, 1902.]

### QUEBEC BRIDGE CO. v. ROY.

*Railway—Construction of statute—Tramway for transportation of materials—Expropriation.*

The place where materials are found referred to in s. 114 of the Railway Act means the spot where the stone, gravel, earth, sand, or water required for the construction or maintenance of the railway are naturally situated, and not any other place to which they may have been subsequently transported.

*Per TASCHEREAU and GIROUARD, JJ.*:—The provisions of s. 114 confer upon railway companies a servitude consisting merely in the right of passage, and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction.

Judgment of the Court below affirmed.

*Alexandre Taschereau*, for the appellants.

*L. P. Pelletier*, K.C., for the respondents.

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YUKON TERRITORY.]

[6TH NOVEMBER, 1902.]

### HARTLEY v. MATSON.

*Appeal—Jurisdiction—Yukon Territorial Court—Decisions of Gold Commissioner—Special appellate tribunal—Finality of judgment—Legislative jurisdiction of Governor in Council—Mining lands.*

The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the court of appeal constituted

by the Ordinance of the Governor in Council, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor in Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 V. c. 11 (D.)

Motion to quash appeal dismissed with costs.

*Latchford*, K.C., for motion.

*Peters*, K.C., contra.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

DIVISIONAL COURT.]

[24TH DECEMBER, 1902.]

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

*Drainage Referee—Official Referee—Reference—Statutes.*

The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee.

Provisions of the Judicature, Arbitration, and Drainage Acts, discussed.

Decision of a Divisional Court, 22 Occ. N. 255, 4 O. L. R. 97, reversed.

*J. H. Moss*, for the appellants.

*G. H. Watson*, K.C., and *N. Sinclair*, for the respondents.

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ROBERTSON, J.]

[24TH NOVEMBER, 1902.]

McDERMOTT v. HICKLING.

*Mistake—Recovery of money paid under mistake of fact—Mortgage—Account—Acknowledgment—Estoppel—Appeal—Cross-appeal—Leave—Parties—Costs.*

The judgment of ROBERTSON, J., 22 Occ. N. 59, was reversed on appeal.



*Held*, that there could be no recovery against the executors, because their testator was not the person who received the erroneous overpayments sought to be recovered back. He omitted to give credit in his books or on the plaintiff's mortgage for two sums paid to him, but the plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors subsequently assigned the mortgage to the defendant G. W. L. H. in part satisfaction of the legacy bequeathed to him by their testator, there was still a considerable balance due thereon. The time when these payments should have been taken into consideration was when the mortgage was being paid off to G. W. L. H. There was nothing to create an estoppel as between him and the plaintiff so as to have prevented the latter from them claiming credit for these payments. G. W. L. H., and not the testator, was the person who received too much, and it was the payment to him which was erroneous.

The executors, upon their appeal from the judgment against them, were entitled to be relieved and to costs of the action. And the plaintiff, although he had omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. H., should be permitted to do so, *nunc pro tunc*, and judgment should be entered for the plaintiff against G. W. L. H. with costs down to the trial and settlement of the judgment as if G. W. L. H. had been the original and only defendant. No costs of the appeal to any of the parties.

*W. M. Douglas*, K.C., and *W. A. Boys*, for the defendants.

*H. H. Strathy*, K.C., and *C. W. Plaxton*, for the plaintiff

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[STREET, J., BRITTON, J., 2ND JANUARY, 1908.]

*In re* SOUTH OXFORD PROVINCIAL ELECTION.

McKAY v. SUTHERLAND.

*Parliamentary elections—Controverted election—Appeal—Settlement of case.*

No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court.

*Semble*, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal.

G. H. Watson, K.C., for the petitioner.

S. H. Blake, K.C., and Eric N. Armour, for the respondent.

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IN CHAMBERS.

[MOSS, C.J.O., 8TH DECEMBER, 1902.]

SMITH v. HUNT.

*Appeal—Supreme Court of Canada—Extension of time—Intention to appeal—Suspension of proceedings—Merits.*

Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court, the applicant must shew a *bona fide* intention to appeal held while the right to appeal existed, and a suspension of further proceedings by reason of some special circumstances in consequence of which they were held in abeyance. No such case having been made out, and the Court not being impressed with the merits of the defence, leave to extend the time was refused to two defendants.

*In re Manchester Economic Building Society*, 24 Ch. D. 488, followed.

D. L. McCarthy, for the motion.

F. A. Anglin, K.C., contra.

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[MACLENNAN, J.A., 5TH JANUARY, 1903.]

McLAUGHLIN v. MAYHEW.

*Appeal—Court of Appeal—Late entry—Refusal of consent—Confirmation—Responsibility for delay—Costs.*

The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on the 22nd April, and gave security on the 22nd May. Reasons of appeal were not served till the 10th September, and reasons against appeal not till the 13th October. The next sittings of the Court of Appeal was set for the 10th November. The appeal case was not prepared in time to enter the case

on the 6th November, and the plaintiff's solicitor refused to consent to its being entered on the 10th for the sittings beginning on that day. The case was entered without consent on the 17th November, and a motion was made to confirm the entry.

*Held*, that the plaintiff's solicitor should have consented to the proposed entry on the 10th November, and the subsequent entry should be confirmed; and, as both parties were nearly equally blameable for delay, there should be no costs.

*F. E. Hodgins*, K.C.; for the defendants.

*O. M. Arnold*, for the plaintiff.

[GABROW, J.A., 2ND JANUARY, 1908.]

### *In re* VOTERS' LISTS OF HUNGERFORD.

*Parliamentary elections—Voters' lists—Notice of appeal—Leaving at clerk's residence.*

The language of R. S. O. 1897 c. 7, s. 17, s.-s. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute.

And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling house, by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient.

*W. B. Northrup*, K.C., for persons opposing the service.

## HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., 27TH NOVEMBER, 1902.]

### FLETT v. COULTER.

*Infant—Examination for discovery—Discretion of examiner—Capacity of infant.*

An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery.

*Arnold v. Playter*, 14 P. R. 399, approved.

Order of MEREDITH, C.J., affirmed.

An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself.

*J. G. O'Donoghue*, for the appellant.

*W. R. P. Parker*, for the respondent.

[BOYD, C., MEREDITH, J., 2ND DECEMBER, 1902.]

DAWDY v. HAMILTON, GRIMSBY, AND BEAMSVILLE  
R. W. CO.

*Street railway—Injury to passenger—Conductor attempting to pull passenger on moving car—Scope of authority—Question for jury—New trial.*

The plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down, but did not stop, and, as it was passing, the conductor seized the plaintiff's hand, and, while attempting to help her on board, signalled the car to go on again, which it did, and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently.

*Held*, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it is slowing up; that the question as to the scope of the conductor's authority is one of evidence; that there was evidence to go to the jury, and the effect of it was for them to consider; and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority.

Judgment of STREET, J., reversed.

*W. M. German*, K.C., for the plaintiff.

*E. E. A. DuVernet*, for the defendants.

✓ [BOYD, C., MEREDITH, J., 8RD DECEMBER, 1902.

**MCDONALD v. SULLIVAN.**

*Attachment of debts—Rent—To whom due—Heirs of deceased landlord—Executors—Devolution of Estates Act.*

Five plaintiffs, claiming as heirs-at-law of their father to be owners of a lot of land, brought an action for specific performance, which was dismissed with costs, subsequently taxed at \$209.49. After the trial one of the plaintiffs, G. R., died, and probate of his will was granted to a sister and co-plaintiff, M. S., and the action was revived in the names of the remaining plaintiffs and M. S. as his executrix, and an appeal against the judgment was also dismissed with costs.

It appeared that G. R. owned one-half of the lot, and the father the other half, and that the lot had been leased to a tenant by M. O'R., one of the plaintiffs, as administratrix of the estate of the father, who died in or before 1896, and M.S., as administratrix of the estate of G. R. No caution was registered under the Devolution of Estates Act.

*Held*, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs.

*Macaulay v. Rumball*, 19 C. P. 284, commented on.

Order of STREET, J., reversed, and that of the Master in Chambers restored.

*W. Proudfoot*, K.C., for the judgment creditors.

*L. V. McBrady*, K.C., for the judgment debtors.

[BOYD, C., MEREDITH, J., 8RD DECEMBER, 1902

**STANDARD TRADING CO. v. SEYBOLD.**

*Costs—Security for—Præcipe order—Increase in amount—Rule 1208—Discretion.*

Under Rule 1208, the fact of the defendant having obtained a præcipe order for security for costs by which a definite amount of security is provided for, will not prevent him from maintaining an application for additional security when it becomes apparent that the costs to be incurred will be greatly in excess of the amount provided for, and there is no element of vexation on the part of the applicant.

*Bell v. Landon*, 9 P. R. 100, distinguished.

Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, \$200 paid into Court in compliance with a præcipe order, was ordered by a Judge (on appeal from a Master's order refusing an increase) to be increased by a bond for \$600 or payment into Court of an additional sum of \$300; and the order was affirmed by a Divisional Court as a reasonable exercise of discretion.

Decision of MACMAHON, J., 22 Occ. N. 414, affirmed.

*J. H. Moss*, for the plaintiffs.

*D. L. McCarthy*, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., 6TH DECEMBER, 1902.]

### BEAUDRY v. GALLIEN.

*Judgment—Reference by consent to experts—Misunderstanding of counsel as to purpose of reference—Opening up judgment.*

In a proceeding before a Master in a mechanic's lien matter, an understanding was arrived at between the counsel for the plaintiff and defendant, and orally communicated to the Master. When the time arrived to act on the understanding, the counsel disagreed in their recollection of what the understanding was. The Master entered judgment for the amount found due by certain experts, in accordance with his understanding of the agreement.

*Held*, that the judgment given by the Master, whose recollection of the understanding was the same as that of the plaintiff's counsel, in favour of the plaintiff, must be reopened and the matter referred back, as the parties were not *ad idem*.

*Wilding v. Sanderson*, [1897] 2 Ch. 534, referred to.

*Geo. F. Henderson*, for the appellants, defendants.

*J. A. Ritchie*, for the plaintiff.

[BOYD, C., 9TH DECEMBER, 1902.]

### LEDUC v. BOOTH.

*Will—Construction—Devisee—Use of house and allowance—Care in institution in the alternative—Exercise of judgment by executor—Reasonableness.*

A testator by his will gave the defendant all his estate on condition that he should pay the plaintiff \$50 a month, and

that she should have the use of the testator's house and furniture for her life; and by a codicil provided that if "in his (the executor's) own absolute judgment he is of opinion" that it would be best for her to be cared for in some institution, he should have the right and authority to place her there (with her consent in a specially mentioned case), and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance.

The defendant chose an institution, where the plaintiff would be a paying inmate and be cared for (not the specially mentioned case), but the plaintiff refused to leave the house, and the defendant ceased paying the monthly allowance, and the plaintiff brought this action for the arrears of the allowance and for the construction of the will.

*Held*, that the will, executed in 1896, indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to the plaintiff that it would be for her welfare to give up housekeeping, and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her in a sufficiently adequate home (other than the specially mentioned case), without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house, and to cease paying the monthly allowance.

*J. E. Jones*, for the plaintiff.

*A. Hoskin*, K.C., for the defendant.

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[BRITTON, J., 24TH DECEMBER, 1902.]

### MAJOR v. MCGREGOR.

*Libel—Post-card—Words of abuse—Natural signification—Innuendo—Necessity for shewing sense in which words understood.*

The defendant, a tax-collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and posted to the plaintiff a post-card stating: "I saw J. S. this morning; he said make the S. B. pay it."

In an action for libel in which the plaintiff alleged that "S. B." applied to him and meant "son of a bitch:"—

*Held*, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff: they are words of abuse, but are, as often

used, absolutely meaningless: they do not impute anything against the character of the mother, and are not a statement of a fact; and in their natural significance are not actionable; and the plaintiff had failed to prove his innuendo.

*G. I. Gogo*, for the plaintiff.

*D. B. Maclellan*, K.C., for the defendant.

[BRITTON, J., 29TH DECEMBER, 1902.]

### GROSSMAN v. CANADA CYCLE CO.

*Copyright—Infringement—Newspaper—"First publication."*

A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 & 6 V. c. 45 requiring first publication in the United Kingdom to entitle the publishers to British copyright.

*C. D. Scott*, for the plaintiffs.

*E. B. Ryckman* and *C. W. Kerr*, for the defendants.

### IN CHAMBERS.

[BOYD, C., 9TH DECEMBER, 1902.]

### REX v. HAYWARD.

*Criminal law—Magistrate's conviction for theft—Juvenile offender—Place of imprisonment—Duration of sentence—Discharge—Order for further detention—Circumstances.*

The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing a small sum of money out of the contribution box of a church. The magistrate's return shewed that the defendant pleaded guilty, and was committed for two years to the Provincial Reformatory. He was taken to the Reformatory and sent on to the Central Prison and kept there in custody under the warrant of commitment to the Reformatory.

On a motion for his discharge on the return of a *habeas corpus*:—

*Held*, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the Reformatory



and in sending him on a sentence of two years to the Central Prison.

*Held*, also, that s. 785 of the Criminal Code is intended to comprehend summary trial "in certain *other* cases" than those enumerated in s. 783, and that when the offence is charged and in reality falls under s. 783 (a), it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under s. 787.

*Held*, also, that, under the circumstances, this was not a case for further detention or the direction of further proceedings under s. 752; and an order for the defendant's discharge was granted.

*E. E. A. DuVernet* and *Gordon J. Smith*, for the motion.

*Frank Ford*, for the Crown.

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[BOYD, C., 18TH DECEMBER, 1902.]

*In re* NORRIS.

*In re* DROPE.

*Lunatic—Committee—Funds in hands of—Payment into Court—Reference—Report of Master—Revision of costs.*

The rule has for many years been that when the Court intervenes in respect to the property of persons not *sui juris*, the money shall not be left to private investment, but shall be paid into Court, and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed.

The general rule to be observed by local officers, when it is advisable that the estate should be realized and turned into money, is, that the fund so realized shall be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court, that proper directions may be given.

In two cases where local Masters had reported schemes for the maintenance of lunatics, and made provision for the moneys of the estates being collected by the respective committees, and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—

*Held*, that it is imperative that the costs in lunacy matters be revised by the proper officer in Toronto; and that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court.

*C. Swabey and W. F. Kerr*, for the committees.

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[BOYD, C., 10TH JANUARY, 1908.]

*In re DENNIS.*

*Will—Construction—Devise—Vested estate, subject to be divested—Rents—Expenditure for improvements.*

Testator devised a farm to his grandson "when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors . . . to expend at least \$50 each year in improvements," with a devise over in case of death "before receiving the share," and a residuary devise to a son and daughter.

*Held*, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than \$50 each year, but more if necessary should, in the opinion of the executors, arise.

*T. Brown*, for the executors.

*G. G. Duncan*, for the residuary devisees.

*F. W. Harcourt*, for the infant.

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[MEREDITH, C.J., 29TH DECEMBER, 1902.]

ANTHONY v. BLAIN.

*Pleading—Amended statement of claim—Delivery of—Irregularity—Time—Validating order—Terms—Costs—Stay of proceedings—Appeal—Waiver—Compliance with terms.*

After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without

leave and without the defendant's consent, delivered an amended statement of claim.

*Held*, that the delivery of the amended statement of claim was irregular under Rule 300.

An order was made, upon the defendant's application to set aside the amended statement of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or if such costs should not be paid within one month after taxation that the amendments should be struck out.

Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order.

*Anlaby v. Praetorius*, 20 Q. B. D. 764, *Hewson v. Macdonald*, 32 C. P. 407, and *Duffy v. Donovan*, 14 P. R. 159, followed.

W. E. Middleton, for the plaintiff.

W. R. Riddell, K.C., for the defendant.

✓ [MEREDITH, C.J., 30TH DECEMBER, 1902.]

# QUA v. CANADIAN ORDER OF WOODMEN OF THE WORLD.

*Pleading—Leave to deliver reply—Time—Jury notice—Discretion—Notice of trial—Close of pleadings.*

Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury.

The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue; and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand.

Rules 257, 258, 262, considered.

R. B. Beaumont, for the plaintiff.

J. H. Moss, for the defendants.

[MEREDITH, C.J., 7TH JANUARY, 1908.]

*In re HOLDEN.**Will—Construction—Speaking from death—Stock in trade—"Now"—Household furniture—Books—Legacy—Incomplete words.*

A testator provided in his will as follows: "I give, devise and bequeath all my real and personal estate of which I may die possessed of or interested in, in the manner following, that is to say, first, I give to my sister Eliza Jane Isaac the house and land with all household furniture and all the stock and trade now in house and out of house, with all book accounts now due me, wherever found, for her own use and benefit forever, and out of this she shall pay to my brother Benjamin Farnsworth Holden \$100, also she shall \$100 to my brother William Jonas Holden."

At his death, and when he made the will, the testator was the keeper of a country village shop, and his possessions consisted of a house and lot, where he carried on his business and lived, the capital employed in his business, his stock of goods, and what was owing to him by his customers, and his household and other effects, consisting of furniture, books, horses, harness, carriages, and sleighs.

Shortly after he made his will he sold his house and lot and business and afterwards repurchased them.

*Held*, that, although the gifts of the household furniture, the stock in trade, and the book debts, were specific bequests, nevertheless, being specific gifts of that which is generic, of that which may be increased or diminished, the will carried the household furniture, the stock in trade, and the book debts, as they existed at the time of the testator's death; and the use of the word "now" did not limit the gift to them as they existed at the date of his will. This was confirmed by the words of general bequest at the commencement, as also by certain other features of the will.

*Held*, also, that in the gift of the "stock and trade" the money of the testator on deposit in the bank and cash in hand and a quantity of cordwood for use in the shop and dwelling-house, two horses, harness, and vehicles, were embraced in the gift.

*Held*, also, that a number of books belonging to the testator passed as part of the household furniture.

The incomplete words of the gift to one brother were sufficient.

*W. T. Allan*, for the administratrix with the will annexed.

*J. Birnie, K.C.*, for Benjamin F. Holden.

*G. W. Bruce*, for William Jonas Holden.

## MANITOBA

## In the King's Bench.

[FULL COURT, 20TH DECEMBER, 1902.]

ROBERTS v. HARTLEY.

*Fraudulent conveyance—Husband to wife—Action to set aside—Land exempt as homestead—Effect of conveyance as to exemption—Inadequacy of consideration.*

An appeal from the decision of DUBUC, J., 22 Occ. N. 185, was allowed and judgment was ordered to be entered for the plaintiff, with the usual provisions for sale and costs of the action and appeal.

*Held*, that the registration of a judgment creates a lien or charge upon the exempted property, although no proceedings can be taken to enforce the charges so long as the property retains the character which entitles it to such an exemption: *Frost v. Driver*, 10 Man. L. R. 319, 15 Occ. N. 169.

The property transferred away was not property to which the creditor could not, *in any event*, resort for payment. Whenever it should cease to be of the character necessary to make it exempt, he would be able to proceed upon the judgment as against it. If the debtor moved away or abandoned it or died, the judgment creditor could proceed. If it should rise in value to over \$1,500, he could do so.

The right to claim exemption from execution is personal to the debtor, and cannot be set up by his assignee. The debtor had no interest in the land and no right to claim its exemption.

Inadequacy of consideration may raise an inference of fraud; such an inference might be said to arise here. The conveyance was expressed to be made in consideration of \$1, and a covenant to pay a mortgage on the land. In fact, the husband, when insolvent, made his wife a valuable present of property which, if the conveyance should stand, would thus be removed from the reach of his creditors.

[FULL COURT, 20TH DECEMBER, 1902.

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## WINTERS v. MCKINISTRY.

*Mortgage—Power of sale—Service of notice—Costs of sale proceedings—  
Fraudulent scheme of mortgagee to obtain land—Sale by way of exchange  
—Notice to third party through solicitor.*

Appeal by defendant Barker from decision of RICHARDS, J., 22 Occ. N. 213.

The trial Judge refused McK. the costs of the sale proceedings.

*Held*, that McK. was well within his rights in taking the steps he did to realize upon his security. The plaintiff was in default, and had left the country, and it was reasonable that the mortgagee should place himself in a position to dispose of the property absolutely.

It might be, if the decree in *Harvey v. Tebbutt*, 1 J. & W. 197, were followed, that the costs charged to the defendant would exceed the costs of a redemption suit, and those of the power of sale proceedings. If the defendant desired to have the costs of the power of sale proceedings allowed, that should be done, but, in such case, the plaintiff should have the option of having the judgment as to the costs of the action varied to conform to the decree in *Harvey v. Tebbutt*. The costs occasioned by making the pretended sale to Dickerson and of the conveyances should not be allowed; only the costs reasonably incurred, and as of an abortive sale, should be taxed. As the defendant failed in all but a comparatively unimportant point, she should be charged with the costs of the appeal.

As McK. had not appealed, there would be no change in the judgment against him.

[BAIN, J., 27TH NOVEMBER, 1902.

## SIMPSON v. OAKES.

*Lien—Threshers' Lien Act, 57 V. c. 36—Notice—Sufficiency of—Unreasonably large amount retained by thresher—Rights of bona fide purchaser for value.*

County Court appeal. The plaintiff claimed from the defendant \$50, the value of wheat, oats, and barley taken by the defendant, upon which the plaintiff claimed a lien under the Threshers' Lien Act. 57 V. c. 36. for his charges for

threshing same and other grain, for one John Riter, who rented the land from the defendant, but did not reside on it. The plaintiff claimed a lien on 60 bushels of wheat; he stated that he began to thresh on the 8th October, and finished on the 9th; he threshed 960 bushels at 7 cents a bushel. Riter did not pay for threshing; the plaintiff asked him to pay about the 28th or 30th October; he asked Riter how much wheat he had left; Riter said about 60 bushels. It was in the granary on the place, and the plaintiff told Riter he had better leave it there, that he (plaintiff) had to have it. Riter said, all right, he would leave it there for the plaintiff, and he left it. A second threshing was done about the 7th November. It was shewn on cross-examination that the 60 bushels in the granary formed no part of the threshing done on the 8th or 9th October; that it was of a different grade, and was part of grain threshed in September.

At the threshing on the 7th November there were threshed 88 bushels of wheat and 400 bushels of oats and barley.

On the 16th November Riter, in payment of his indebtedness to the defendant for rent, handed him over all the grain in the granary, which consisted of 60 bushels of wheat and 195 bushels of oats, and gave the defendant the key of the granary.

On the 21st November the plaintiff put up a notice on the door of the granary, stating that all grain therein contained was seized by him, for cost of threshing under the Threshers' Lien Act.

On the 25th November the defendant sold the wheat, and in January he sold the barley. The plaintiff then sued the defendant for conversion in the County Court of Morden, and obtained a verdict for the full amount due for threshing, \$50, and costs. The defendant appealed.

It was objected that the notice was defective, as it did not state the amount claimed, and it purported to claim a lien upon all the grain, the value of which was greatly in excess of the plaintiff's claim.

The notice put up by the plaintiff was as follows: "Take notice that all grain herein contained is seized by me for cost of threshing under the Threshers' Lien Act. Geo. Simpson, thresher."

The appeal was allowed with costs, the verdict for the plaintiff in the County Court set aside, and a verdict entered for the defendant with costs.

*Held*, that the notice was defective, as it did not specify any particular grain or any particular quantity, it did not mention the amount for which the lien was claimed, or the date of the threshing. The amount owing was \$26, while the

market value of the wheat and barley that were in the granary was about \$86. The quantity of grain the plaintiff was attempting to retain was unreasonably large for the amount Riter owed him.

The defendant was in possession of the grain as a *bona fide* purchaser for value, and any claim the plaintiff could have to it could be derived only from the statute. It lay on him to shew that he had brought himself strictly within its provisions, and he had not done so.

A. B. Hudson and A. W. Bowen, for the plaintiff.

C. P. Wilson, for the defendant.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 18TH JUNE, 1902.]

#### SAUNDERS v. RUSSELL.

*Mortgage by infant—Voidable contract—Repudiation of—What amounts to—  
Infants' Contracts Act.*

Appeal from judgment of IRVING, J., dismissing a foreclosure action.

*Held*, that a mortgage executed by an infant before the passing of the Infants' Contracts Act is not void but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age.

R., in 1896, being then an infant, executed a mortgage in favour of S., the plaintiff. R. came of age on the 27th January, 1900, and at that time, on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mortgage. R.'s solicitors on the 13th February, 1900, wrote S., saying that no valid mortgage had ever been executed by R., and threatening proceedings to protect their client's interests, and on the 2nd March they began an action on behalf of R. against S. for a declaration that the mortgage was null and void and an injunction restraining the sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction, he said in substance that the reason he did not pay was because



he couldn't, and that he had never repudiated his contract, and in October, 1900, he discontinued his action. On the 2nd November, 1900, S. commenced his foreclosure action, and in defence R. pleaded infancy.

*Held*, that the solicitors' letter and the writ in *Russel v. Saunders* did not constitute a repudiation, as they were qualified by R.'s statement that he did not intend to repudiate.

Judgment of IRVING, J., dismissing the action, reversed.

*L. P. Duff*, K.C., for the appellant.

*Harold Robertson*, for the respondent.

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[FULL COURT, 17TH NOVEMBER, 1902.]

RENDELL v. McLELLAN.

*Appeal—Amending Judge's notes of evidence—Practice.*

On the hearing of an appeal from the decision of a County Court Judge, counsel for the appellant applied to introduce further evidence alleged to have been omitted from the Judge's notes of evidence taken at the trial.

The Court refused the application, holding that where a party desires to introduce, on an appeal, evidence alleged to have been omitted from the Judge's notes of evidence, he should first apply to the Judge to amend his notes.

*W. H. P. Clement*, for the appellant.

*E. P. Davis*, K.C., for the respondent.

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[FULL COURT, 17TH NOVEMBER, 1902.]

CENTRE STAR CO. v. ROSSLAND MINERS' UNION.

*Pleading—Amendment—Exceeding terms of order allowing—Waiver of right to object.*

Two weeks after the receipt of an amended statement of claim the defendants' solicitors wrote to the plaintiffs' solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out the amended statement of claim, on the ground that it exceeded the terms of the order authorizing amendment.

*Held*, reversing the decision of FORIN, Loc.J., that the defendants had waived their right to object.

A. C. Galt, for the appellants.

S. S. Taylor, K.C., for the respondents.

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[FULL COURT, 25TH NOVEMBER, 1902.]

*In re* SMITH.

*Appeal—Right to—Party interested—Who is—Rivers and Streams Act, s. 12*

Appeal from an order of SPINKS, Co.J., allowing one S. C. Smith to charge tolls for boomage, rafting, etc., of logs, etc., on the Spallumcheen river. The appeal was brought by one Ryan, who alleged that he was a lessee from the Dominion Government of timber berths adjoining the river, but who was not a party to the proceedings before the County Court Judge.

Section 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County Court Judge he may appeal to the Supreme Court.

*Held*, that "party interested" means one who was a party to the proceedings before the Judge appealed from.

Appeal dismissed with costs; IRVING, J., dissenting.

F. J. Fulton, K.C., for the appellant.

E. P. Davis, K.C., for the respondent.

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## Supreme Court of Canada.

EXCHEQUER COURT.]

[11TH DECEMBER, 1902.]

### GILBERT BLASTING AND DREDGING CO. v. THE KING.

*Crown—Contract—Public work—Abandonment and substitution of work—  
Implied contract.*

The suppliants contracted with the Crown to do certain work on the Cornwall canal, the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to in the specifications, namely, "all the dredging of the Cornwall canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated, the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By cl. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done, the Crown abandoned the scheme of constructing dams contemplated by the contract, and adopted another plan, the work on which was given to other contractors. After it was completed the suppliants filed a petition of right for the profits they would have made had it been given to them.

*Held*, affirming the judgment of the Exchequer Court, 7 Ex. C. R. 221, 22 Occ. N. 82, that the contract contained no express covenant by the Crown to give all the work done to the suppliants, and cl. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed.

*A. B. Aylesworth*, K.C., and *N. A. Belcourt*, K.C., for the appellants.

*E. L. Newcombe*, K.C., for the Crown.

ONTARIO.] 

[9TH DECEMBER, 1902.]

## ATTORNEY-GENERAL v. SCULLY.

*Appeal—Special leave—60 & 61 V. c. 34, s. 1 (e)—Error in judgment—Concurrent jurisdiction—Procedure.*

Special leave to appeal from a judgment of the Court of Appeal for Ontario, under s. 1 (e) of 60 & 61 V. c. 34, will not be granted on the ground merely that there is error in such judgment.

Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.

The Ontario Courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S., having been refused such fiat, applied for a writ of mandamus, which a Divisional Court granted (21 Occ. N. 432, 2 O. L. R. 315), and its judgment was affirmed by the Court of Appeal (22 Occ. N. 360, 4 O. L. R. 394).

*Held*, that the mandamus having been granted the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal, though it might have had the writ been refused.

The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers, with which the Supreme Court should not interfere.

Motion for leave to appeal refused with costs.

*J. R. Cartwright*, K.C., for the motion.

*F. Arnoldi*, K.C., contra.

BRITISH COLUMBIA.]

[17TH NOVEMBER, 1902.]

## PAULSON v. BEAMAN.

*Mines and minerals—Adverse claim—Form of plan and affidavit—Right of action—Condition precedent—Necessity for actual survey—Blank in jurat.*

The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the Mineral Act of British Columbia, as amended by s. 9 of the Mineral Act Amendment Act, 1898, need not be based on an actual survey of the location made by the provincial land surveyor who signs the plan.

The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to

the right of the adverse claimant to proceed with his adverse action.

The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn.

*Held*, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by the British Columbia Oaths Act, and the British Columbia Supreme Court Rule 415 of 1890.

Judgment of the Court below reversed.

*S. S. Taylor*, K.C., for the appellant.

*E. P. Davis*, K.C., for the respondents.

### HARTLEY v. MATSON.

*Mines and minerals—Placer mining—Hydraulic concessions—Staking claims—Annulment of prior lease—Volunteer plaintiff—Right of action—Status of adverse claimants—Trespass.*

In an action by free-miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect:—

*Held*, that, where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" claims on the lands included within the leased limits did not give them any right or interest in the lands, nor did they thereby acquire such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease.

Judgment of the Court below affirmed.

*F. Peters*, K.C., for the appellant.

*F. R. Latchford*, K.C., and *J. Lorn McDougall*, for the respondent.

### McKELVEY v. LE ROI MINING CO.

*Master and servant—Injury to servant—Negligence—Findings of fact—Machinery in mine—Defective construction—Proximate cause of injury—Fault of fellow-workman—Defective ways, works, and machinery—Disturbing verdict on appeal—Questions of law not raised below*

Questions of law appearing upon the record, but not raised in the court below, may be relied upon for the first time on an appeal to the Supreme Court of Canada.

An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable, which ran over a sheave-wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft, and the cage was fitted with automatic dogs or safety clutches, intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty feet below the sheave-wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave-wheel with such force that the cable broke, and, the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level, and injured the plaintiff, who was engaged at the work for which he was employed by the defendants, about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the proximate cause of the injury was occasioned by the non-continuance of the guide-rails, which, in their opinion, caused the safety-clutches to fail in their action, and thereby allowed the cage to fall.

*Held*, that the Court ought not, on appeal, to disturb the verdict entered for the plaintiff, as there was sufficient evidence to support the finding of fact by the jury.

Judgment of the Court below reversed.

*A. B. Aylesworth*, K.C., and *A. H. MacNeill*, K.C., for the appellant.

*T. M. Daly*, K.C., for the respondents.

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## OPPENHEIMER v. BRACKMAN AND KER MILLING CO.

*Sale of goods—Condition as to acceptance—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Right of action.*

The appellant, O., wrote a letter, dated the 2nd October, 1899, offering to supply the company with thirty-seven car loads of hay at prices mentioned, "subject to acceptance in five days, delivery within six months." On the 5th October the company wrote and mailed a letter in reply, as follows: "We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd inst.

Please ship as soon as possible the orders you already have in hand, and also get off the seven cars as early as possible, as our stock is very low. Try and ship us 3 or 4 cars so as to catch the next freight here from Northport. We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have 3 or 4 cars by next freight."

This letter was registered, and by reason of the registration was not received by O. within the 5 days. Had it not been registered O. would have received it in the ordinary course of post within the 5 days. As a fact it was not received until the following day. On the 12th October O.'s agent wrote the company acknowledging the letter and saying that O. regretted to inform the company that the acceptance of the offer arrived too late, and he was therefore not able to furnish the hay.

On the 6th November the company wrote O. in reply insisting on delivery of the hay as contracted for by the 15th of that month, and notifying him that, in case of default, they would replace the order, charging him with any extra cost and expenses.

Prior to the expiration of the six months mentioned in O.'s letter, the company, in defence to an action by him against them, counterclaimed for damages claimed on account of his alleged breach of contract for delivery of the thirty-seven car loads of hay.

*Held*, that, as the six months limited for making delivery had not expired, the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature.

Judgment below reversed.

*A. B. Aylesworth*, K.C., and *R. S. Lennie*, for the appellant.

*S. S. Taylor*, K.C., for the respondents.

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#### VAN NORMAN CO. v. McNAUGHT.

*Mines and minerals—Free-miner—Lapsed interest—Co-owners—Special certificate.*

Where the interest of a free-miner in a mining location has lapsed on account of failure to renew his free-miner's

certificate, and the interest has vested in his co-owners under the provisions of the Mineral Act of British Columbia and the Mineral Act Amendment Act 1899, such interest cannot afterwards become revested in the original owner by the issue of a special free-miner's certificate procured by such free-miner or any person claiming through him.

Judgment of the Court below, 22 Occ. N. 341, 9 Brit. Col. L. R. 131, affirmed.

*F. Peters, K.C., and R. S. Lennie, for the appellants.*

*S. S. Taylor, K.C., for the respondent.*

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### PITHER v. MANLEY.

*Bills and notes—Payment—Accord and satisfaction—Mistake—Principal and agent.*

On being pressed for payment of the amount of a promissory note, the defendant offered to convey a lot of land (which he then shewed to the plaintiffs' agent) to the plaintiffs in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs, but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been inspected at the time the offer was made. More than a year afterwards, the plaintiffs sued the defendant on the note, and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them, and at the trial the plaintiffs recovered judgment. On appeal to the full Court the judgment at the trial was reversed and the action dismissed.

*Held*, affirming the judgment appealed from, 9 Brit. Col. L. R. 257, that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt, and could not recover on the promissory note.

*E. P. Davis, K.C., for the appellants.*

*Duff, K.C., for the respondent.*



COLONIST PRINTING AND PUBLISHING CO. v.  
DUNSMUIR.

*Company—Election of directors—Agreement among promoters—Control of election—British Columbia Companies Act 1890.*

A provision whereby it is sought to give to the-holders of a minority of the shares in a joint stock company incorporated under the British Columbia Companies Act, 1890, the right of electing the majority of the board of directors, from time to time, when directors are to be elected, is illegal and *ultra vires* of the corporation, being repugnant to the conditions imposed by the statute in the interests of the public.

Judgment in 9 Brit. Col. L. R. 278 reversed.

C. Robinson, K.C., and F. B. Gregory, for the appellants.

F. Peters, K.C., for the respondents.

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ONTARIO

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Supreme Court of Judicature.

COURT OF APPEAL.

FALCONBRIDGE, C.J.]

[26TH JANUARY, 1908.]

BLAIN v. CANADIAN PACIFIC R. W. CO.

*Railway—Assaults on passengers—Negligence—Duty of conductor.*

Action for damages for negligence of the defendants or their servants in failing, after due notice, to properly guard and protect the plaintiff against assault on one of their trains.

There was ample evidence that the plaintiff was assaulted and ill-used on the train, and that the conductor was told of the conduct of the assailant and of his threats to continue it.

*Held*, that it was for the jury to decide whether, with the knowledge the conductor had, he acted reasonably and diligently, or whether after being told, as he was by the plaintiff and others, of the assailant's drunken condition, and of the assaults he had already committed upon the plaintiff and other passengers before the train started, the conductor acted unreasonably and negligently in refusing and failing to take reasonable steps to prevent the subsequent assaults; and appeal by the defendants from the judgment of FALCONBRIDGE, C.J.,

at the trial upon a verdict of the jury in favour of the plaintiff, awarding him \$3,500 damages, dismissed.

*E. F. B. Johnston*, K.C., and *Shirley Denison*, for the appellants.

*W. R. Riddell*, K.C., *D. O. Cameron*, and *J. G. O'Donoghue*, for the plaintiff.

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## HIGH COURT OF JUSTICE.

[BOYD, C., MEREDITH, J., 5TH DECEMBER, 1902.]

### HUNT v. TOWN OF PALMERSTON.

*Municipal corporations—Public libraries—Aid by municipality—Grant for site—Validity of by-law—Assent of electors.*

A mechanics' institute having been converted into a public library, and a board of management organized under R. S. O. 1897 c. 232, part II., a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate, without the assent of the electors to either the appointment of the library board or to the grant.

*Held*, that the power to grant aid to free libraries is absolutely in the hands of the local municipality under the general provision of the Municipal Act, and that the by-law was valid notwithstanding s. 18 of R. S. O. 1897 c. 232, which may have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers intrusted to particular free library boards under ss. 14 and 17 of the Act.

*J. Montgomery*, for the plaintiff.

*John J. Drew*, for the defendants the town corporation.

*J. H. Tennant*, for the defendants the library board.

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[MEREDITH, C.J., 16TH JANUARY, 1908.]

### *In re* RATHBUN CO. AND STANDARD CHEMICAL CO.

*Arbitration and award—Directing 'special case under Arbitration Act—Question of law arising in course of reference—Construction of contract—Other questions—Discretion.*

Application by the Standard Chemical Company, under the Arbitration Act, R. S. O. 1897 c. 62, s. 41, for a direction

to arbitrators to state a special case. The arbitrators had been appointed under the arbitration clause in an agreement between the two companies whereby the Rathbun Company agreed to lease to the Standard Company certain buildings, machinery, and plant for the production of charcoal, and to provide the Standard Company for daily use with a maximum of 66 cords of wood, of which not more than 30 per cent. should be soft wood, and the Standard Company agreed to employ competent men to work the kilns and properly carbonize the wood into charcoal, and deliver charcoal to the Rathbun Company to a maximum quantity of 85,000 bushels per month.

The 22nd clause then provided that "in case of any dispute, or disagreement, or difference of opinion, arising between the parties in regard to the meaning or construction of this agreement, or of any part thereof, or of the mutual obligations of the parties or of the subjects to be referred to arbitration as hereinafter mentioned, or of any other act, matter, or thing relating to or concerning the carrying out of the true spirit, intention, or meaning of these presents, the same shall be determined by arbitration," &c.

Disputes did arise under the agreement, and amongst others as to the following points:—

(1) Whether upon the true construction of the contract the applicants were, for the 66 cords of wood delivered daily, bound to deliver 85,000 bushels of charcoal per month, or whether it was sufficient if they delivered what was or might have been, with proper care and skill and without waste, produced from the wood.

(2) Whether there had been such a breach of the agreement on the part of the Standard Company as entitled the Rathbun Company to take possession of the leased premises under the terms of the agreement.

(3) Whether the claim of the Rathbun Company against the Standard Company that the latter had used more wood than 66 cords per day was a proper subject for reference to arbitration under clause 22 of the agreement.

*Held*, as to the first point in dispute, which involved the claim of the Rathbun Company for damages for short delivery of charcoal, such shortage being claimed whatever might be taken as the meaning of the agreement, that this left the question as to the proper construction of the agreement open, which was a question of law "arising in course of the reference," within the meaning of s. 41 of the Arbitration Act, and therefore a special case might properly be directed as to it.

The special case having been thus directed as to the first and principal question, it might properly be made to include also the other two questions in dispute, whether the arbitrators had or had not ruled upon them (a point which was disputed), and even though, had they been the only questions which the applicants desired to have stated, it would not have been proper to direct a case as to them under the circumstances.

A party to a reference is not entitled *ex debito justitiæ* to have a special case directed whenever a question of law has arisen in the course of a reference. It is a matter resting in the discretion of the Court.

*W. Laidlaw*, K.C., and *J. Bicknell*, K.C., for the applicants.

*E. D. Armour*, K.C., and *C. A. Masten*, for the Rathbun Company.

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[STREET, J., 26TH JANUARY, 1903.]

✓ BLACK v. IMPERIAL BOOK CO.

*Copyright—Foreign reprints—Notice to commissioners of customs.*

Judgment noted *ante* 14, recalled; and judgment now given holding that s. 152 of the Imperial Customs Law Consolidation Act, 1876, in the said note mentioned, is not in force in this Province, notwithstanding the expression of opinion of the Commissioners in part IV. of the appendix to volume 3 of the Revised Statutes of Ontario, 1897, to the effect that that section is in force; and that the plaintiffs had established their right to an injunction perpetually restraining the defendants the Imperial Book Company from importing into Canada any copies of the 9th edition of the *Encyclopædia Britannica*, and for delivery up, and for an account.

*Held*, also, that the production of a certified conv of the entry in the book of Registry at Stationers' Hall is all that is necessary to make out a *primâ facie* proprietorship in the copyright of an *Encyclopædia*, under ss. 18 and 19 of the Imperial Copyright Act, 1842, and it is not necessary, for such *primâ facie* case, to prove by direct evidence other than the copy of the entry, the facts which by ss. 18 and 19 are made conditions precedent to the vesting of the copyright in one who is not the author.

*W. Barwick*, K.C., and *J. H. Moss*, for the plaintiffs.

*S. H. Blake*, K.C., and *W. E. Raney*, for the defendants the Imperial Book Company.

*A. Mills*, for the defendant Hales.

## IN CHAMBERS. ✓

[BOYD, C., 10TH DECEMBER, 1902.]

*In re* ROCHON v. WELLINGTON.*Prohibition—Division court—Garnishment of married man's wages—Exemption—Evidence of marriage—Repute.*

In an action in a Division Court, where the Judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man, and so entitled to the \$25 exemption provided for by R. S. O. 1897 c. 60, ss. 180, 181:—

*Held*, that the Judge did not decide upon a state of conflicting facts, but upon a theory that the best evidence must be given, and that it was a wrong assumption in point of law; and prohibition should be ordered.

*Elston v. Rose*, L. R. 4 Q. B. 4, followed.

*W. E. Middleton*, for the applicant.

*Edward Bayly*, for the primary creditor.

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[BOYD, C., 11TH DECEMBER, 1902.]

*In re* NAYLOR.*Will—Devise to religious institution—"Acquisition" of land—Commencement of period—Life estate.*

The seven years during which a religious institution may hold land after its "acquisition" under s. 19 of R. S. O. 1877 c. 216 (now s. 24 of R. S. O. 1897 c. 307), does not commence to run, in the case of a devise of a reversion dependent upon a life estate, until the expiry of the life estate.

*W. E. Middleton*, for the executors.

*W. F. Kerr*, for the Methodist Church.

No one for the heirs at law.

## NOVA SCOTIA.

## In the Supreme Court.

## IN CHAMBERS.

[RITCHIE, J., NOVEMBER, 1902.]

## DEAL v. COOK.

*Trespass to land—Riparian proprietor—Conveying timber and lumber on stream.*

The plaintiff was the owner of land bounded on one side by a stream, above tidewater and not navigable. The defendant was a lumberman, and, in order to assist his operations in driving logs down stream, erected a permanent dam, one end of which rested on the plaintiff's land. To an action by the plaintiff for damages the defendant pleaded *inter alia* that the entry complained of was a reasonable use of the land and was a use authorized by R. S. N. S. 1900 c. 95, "of the conveying of timber and lumber on rivers and the removal of obstructions therefrom," and amending Acts.

*Held*, that the erection of the dam was clearly a trespass and could not be justified under c 95. or under the Acts of 1902 c. 33, no commissioner having been appointed for the stream in question or for the river into which it ran.

*Held*, that s. 15 of c. 95, which gives the right to construct dams necessary to facilitate the floating of logs down streams during freshets, is subject to the provisions of s. 6, which requires the assent of the owner of land entered upon to be obtained, and can only be construed to apply to temporary erections, and not to permanent erections, such as the one in question.

*Held*, that s. 17 of c. 95, as amended, only gives the right to enter for the purpose of driving or removing logs and not for the purpose of making erections.

*Held*, that, as the plaintiff had failed to prove any substantial damage, there should be judgment in his favour for \$5 damages and costs.

*B. Russell, K.C., and J. J. Power, for the plaintiff.*

*T. Notting, for the defendant.*

[RITCHIE, J., 27TH JANUARY, 1908.]

## REX v. VENOT.

*Criminal law—Theft—Juvenile offender—Imprisonment—Warrant of commitment—Defect—Amendment—Discharge.*

The defendant was detained in St. Patrick's Home, a public and reformatory prison at Halifax, under a warrant of commitment from the stipendiary magistrate for the town of Dartmouth, reciting a conviction of the prisoner before that magistrate, for the offence of fraudulently and without colour of right taking and converting to his own use one stove of the value of \$5, the property of one W., with intent to deprive said W. absolutely of the said stove.

A return to an order in the nature of a habeas corpus made under R. S. N. S. c. 181, shewed that the prisoner was detained under a warrant of commitment made the 9th January, 1903, by the stipendiary magistrate in and for the town of Dartmouth, a copy of which was annexed, and that he came into the custody of the keeper of the home, under said warrant on said last mentioned day, and was detained on said warrant until the 22nd January, 1903, when, being still in custody, the magistrate caused to be delivered to the keeper of the home a certain other warrant of commitment, under which the prisoner had been detained ever since.

*Held*, ordering the discharge of the prisoner, that the return to the order was bad, because neither it nor the second commitment shewed that the magistrate intended to amend the first warrant, or substitute the second one for it.

*In re Elmy v. Sawyer*, 1 A. & E. 843, followed.

*J. J. Power* and *O. R. Regan*, for the prisoner.

No one appeared for the Crown.

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 BRITISH COLUMBIA.
 

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## In the Supreme Court.

[FULL COURT, 16TH APRIL, 1902.]

## D'AVIGNON v. JONES.

*Evidence—Relevancy—Evidence to contradict.*

Appeal by the plaintiff from the judgment of CRAIG, J., in the Territorial Court of the Yukon Territory.

In an action to set aside a bill of sale of a mineral claim, on the ground that it was a forgery by one of the defendants, evidence was given by the plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence witnesses were allowed to give evidence shewing that the plaintiff and his witnesses, in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy, and tending to shew that a like fraudulent scheme was being attempted in this case, and the result was that the Judge was so influenced by this evidence that he gave judgment for the defendants.

*Held*, that the evidence on behalf of the defendants was properly admitted.

*F. Peters, K.C., and A. G. Smith (of the Yukon Bar),* for the plaintiff.

*E. P. Davis, K.C., and F. C. Wade, K.C. (of the Yukon Bar),* for the defendants.

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[FULL COURT, 3RD DECEMBER, 1902.]

*In re* VANCOUVER INCORPORATION ACT AND ROGERS.

*Assessment—Vancouver Incorporation Act, 1900, ss. 38, 56—Valuation of improvements—Mode of—Decision of Judge on appeal from Court of Revision—Appeal from.*

Appeal from judgment of IRVING, J., refusing on an appeal from the Court of Revision to reduce the assessment of a certain lot, and the improvements thereon, in the city of Vancouver, the property of the appellant, B. T. Rogers.

No appeal lies from the decision of a Judge on an appeal from the Court of Revision, had under s. 56 of the Vancouver Incorporation Act.

An objection to an appeal on the ground that the Court has no jurisdiction to hear it is not a preliminary objection within s. 83 of the Supreme Court Act.

Although the full Court has no jurisdiction to hear an appeal, it has jurisdiction to award costs in dismissing it.

Under s. 38 of the Vancouver Incorporation Act, 1900, all ratable property for assessment purposes shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor.



*Held, per IRVING, J.,* that in estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive.

*L. G. McPhillips, K.C.,* for the appellant.

*E. P. Davis, K.C.,* for the respondent.

## IN CHAMBERS.

[BOLE, LOC. J., JANUARY, 1908]

### HOLLINGSHEAD v. ARMSTRONG.

*Discovery—Action against sheriff—Examination of sheriff's deputy.*

In an action against two sheriffs for neglect of duty as sheriffs, an order was made for the examination for discovery by the plaintiff of the deputy of one of the defendants, it appearing that that defendant had himself been examined and had deposed that certain acts, alleged to affect the matters in question, had been done by the deputy.

Order 61 of the Supreme Court Rules should be read as supplemental to Order 31, and taken together they were authority for the order.

*Smith v. Clarke*, 12 P. R. 217, *Dawson v. London Street R. W. Co.*, 18 P. R. 223, *Casselman v. Ottawa, &c., R. W. Co.*, *ib.* 261, *Harris v. Toronto Electric Light Co.*, *ib.* 285, and *Lyell v. Kennedy*, 8 App. Cas. 217, referred to.

*Myers Gray*, for the plaintiff.

*G. E. Corbould, K.C.,* for the defendants.

## NORTH-WEST TERRITORIES

### In the Supreme Court.

[RICHARDSON, J., 20TH JANUARY, 1908.]

### INDIAN HEAD WINE AND LIQUOR CO. v. SKINNER.

*Sale of goods—Action for price—Illegality of sale—Intoxicating liquors—License in name of one partner—Release obtained by misrepresentations—Rescission.*

One Blisson and several other persons, carrying on business at Indian Head, under the name and style as above, sued the defendant, on the 25th January, 1902, to recover:—

1. The amount of an overdue bill of exchange drawn by the plaintiffs on and accepted by the defendant for \$411.34 and interest thereon from its maturity.

2. \$282.05 for goods sold and delivered by the plaintiffs to the defendant, as shewn by an itemized account forming part of the statement of claim.

In defence the defendant:

1. Denied accepting the bill of exchange, as also the sale of any goods.

2. Alleged that, if the defendant accepted the bill of exchange, the consideration therefor was a supply of intoxicating liquors, for selling which the plaintiffs had not the license required by the Liquor License Ordinance, and the sale was in contravention of the said Ordinance and was illegal.

3. A similar defence quoad the plaintiffs' claim for goods sold.

4. Alternatively the defendant alleged that on or about the 22nd January, 1902, and after his debt to the plaintiffs had matured, the defendant, the plaintiffs, and certain other creditors of the defendant, together with one A. Dundas, mutually agreed that the defendant should assign to Dundas certain property in Indian Head at the valuation of S. S. Davidson and H. H. Campkin, and that the amount of such valuation should be paid by Dundas to the creditors of the defendant *pro rata* by fixed instalments; that the plaintiffs and the other creditors of the defendant agreed to accept the Dundas payments in full satisfaction of their respective claims and release the defendant therefrom; that the defendant assigned to Dundas, the valuation having been made, by which the defendant was discharged from the plaintiffs' claim.

5. As a further alternative the defendant alleged that in January, 1902, upon one Dundas agreeing with the plaintiffs to pay to plaintiffs a proportion of their claim, in consideration of the conveyance by the defendant of certain property, and in consideration of the plaintiffs releasing the defendant from his debt to them, the plaintiffs agreed with Dundas and the defendant to release the defendant from all liability for their claim, and look to Dundas solely in respect thereof. The property was so conveyed, and Dundas became liable to pay the plaintiffs their said proportion, and the defendant was discharged.

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Upon these defences the plaintiffs:

1. Joined issue.

2. As to paragraphs 2 and 3 of the defence the plaintiffs alleged that they were co-partners, and from them as such the defendant purchased the goods (the consideration for the bill and the other goods sued for), a license for the sale of which under an arrangement among themselves was granted and taken out in the name of one of themselves, Pierre Remy Blisson, under the provision of the Liquor License Ordinance.

3. As to paragraphs 4 and 5, the only arrangement was that set out in paragraph 4, into which the plaintiffs were induced to enter by fraud of the defendant in falsely representing to the plaintiffs that his total indebtedness was \$6,000, whereas in truth and fact it was then double that amount, discovering which within a reasonable time after entering into the arrangement, and before the plaintiffs had received any benefit thereunder, the plaintiffs repudiated the arrangement.

There being no rejoinder or subsequent pleading by the defendant, the 2nd and 3rd paragraphs of the reply were in issue.

*T. C. Johnstone*, for the plaintiffs.

*H. G. Wilson*, for the defendant.

RICHARDSON, J.:—At the hearing the acceptance by the defendant of the bill of exchange sued for, also the sale and delivery of the goods detailed in the statement of claim, were proven. It further appeared that the consideration for the bill of exchange was for goods sold, \$411.34, of which items aggregating \$327.34 were for intoxicants; and in the account for goods set out in the statement of claim \$245.06 was for intoxicants.

To meet this the plaintiffs established the existence of the license to sell under the arrangement set out in the 2nd paragraph of the reply.

An objection was then raised that, inasmuch as the license was granted to Blisson, the authority to sell liquor conferred by it would not enure to the plaintiffs as a firm, and ss. 13, 19, and 81 of the Liquor License Ordinance were referred to by the defendant's counsel in support of this contention.

Section 13 provides that licenses may be issued in the name of a co-partnership; by s. 19, every license for the sale of liquor shall be held to be a license only to the person named therein, and for the premises therein mentioned, and shall remain valid only as long as such person continues to be the

occupant of the said premises and the true owner of the business there carried on. By s. 81, no person shall sell any liquor without having first obtained a license authorizing him to do so.

In *Brown v. Moore*, 32 S. C. R. 93, it is determined, and thus binding on this Court, that where by law sales of liquor without license are prohibited, recovery for such sales cannot be enforced.

Partial illegality of consideration in a bill or note is a good answer to a suit thereon as between the original parties *pro tanto*: Byles on Bills, p. 150.

The plaintiffs held no license to sell in their own name or in their firm name. The person who did hold a license to sell was Blissou, who, while the sales were going on, was neither the sole occupant of the premises nor the true owner of the business there carried on.

This being so, the plaintiffs, in my opinion, were prohibited under s. 81 from recovering, in this Court, for liquors sold.

While, however, the sales of liquor claimed for cannot be supported or enforced in this suit, the prohibition will not extend beyond liquor sold, so that of the bill of exchange the other sales included in it, \$26.10, and of the open account \$24, not liquors, are enforceable; and for these plaintiffs are entitled, if not shut out by other defences raised, to succeed in the suit.

The remaining question to be determined is whether or not the debt due by the defendant to the plaintiffs was discharged.

I find as facts the following:—

On 22nd January, 1902, the defendant being unable to meet his financial engagements, a meeting of his creditors who resided in Indian Head was held, at which the defendant was present, as also the plaintiffs, represented by Blissou, and several others.

On being asked what his liabilities were, the defendant made out a statement in pencil which, being corrected with the assistance of some of his creditors then present, shewed liabilities \$6,037.

An offer having been made by A. Dundas to purchase the defendant's estate at a value shewn by outside independent valuation, but estimated to reach about \$7,000, upon defendant's representations of his liabilities as stated in the pencil memorandum, and that the value of his assets to be

transferred to Dundas exceeded these liabilities by \$1,000, the plaintiffs through Blisson signed an instrument worded thus: "In consideration of A. Dundas purchasing the stock in trade, furniture, fixtures, &c., of the Royal Hotel, and the horses, lots, &c., from H. W. Skinner, at the valuation as agreed upon between G. S. Davidson and H. H. Campkin, we the undersigned agree with the said Dundas to *pro rata* on our respective accounts in proportion to the relative values of the assets and liabilities, at the present time, and to give the said Skinner a receipt in full of his account—Dundas agreeing to pay the amounts as follows:—25 per cent. down, balance in 3 equal payments, in 3, 6, and 9 months."

Across this instrument appears this:—

"I accept the said proposal on the said terms. Andrew Dundas."

"In consideration of the arrangement entered into between my creditors and A. Dundas, I hereby agree to hand over to H. H. Campkin for the benefit of my creditors all my book debts and other accounts. H. W. Skinner."

Treating the agreement as a sale to him of the property, Dundas at once entered into possession on the night of 22nd January, and to the sale to him by Skinner, the plaintiffs never objected. This creditors' meeting was adjourned over for the preparation of legal documents by Mr. Wilson to carry into effect the agreement, and resumed on the 24th January, in Mr. Wilson's office, when Blisson discovered that the statement of liabilities furnished on the evening of the 22nd (and after signing the instrument I have referred to) was untrue, being considerably under the true amount, and instead of the Dundas purchase price (it having by this time been fixed at \$6,915.50) being sufficient to pay off the liabilities, it was found that they then exceeded \$9,000, and the plaintiffs, through Blisson, notified Mr. Wilson, in the presence of other creditors, and before any money had actually passed from Dundas on the purchase, that the plaintiffs would have nothing more to do with the agreement of the 22nd January, and repudiated it for the reason that the defendant's statement of assets was far from true; and on the following day, the 25th January, before anything further had been actually done, the plaintiffs having received no benefit whatever under the agreement, they issued their writ in this action.

Summarized, the following questions of fact are presented:

1. Did Skinner on the 22nd January, 1902, at the meeting of his creditors on that day, make the statement of fact

in Blisson's presence that his total indebtedness to his creditors was only \$6,037, and less than his assets by \$1,000?

2. Was this statement of fact untrue?

3. Did this statement of fact form the basis and material for the plaintiffs agreeing to discharge the defendant from further liability to them for his said debt?

My answer to these questions being in the affirmative:—

4. Had the plaintiffs, before they repudiated the agreement of the 22nd January, 1902, received any material benefit under it?

To this my finding is in the negative.

The learned counsel for the defendant based his support of the defence set up of discharge of the debt sued for by referring me to the principles laid down in *Derry v. Peek*, 14 App. Cas. 337.

Referring, however, to *Derry v. Peek*, it is to be observed that the action was to recover damages for deceit, while what is claimed for in this action is rescission, and at p. 359 Lord Herschell, delivering the main judgment, is thus reported:—

“An action of deceit differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.”

My judgment on this branch of the case is that the plaintiffs have established that they became parties to the discharge of their debt set up by the defendant, by misrepresentation to the plaintiffs of a material fact, on discovering which to be untrue before receiving any benefit, the plaintiffs repudiated, and the discharge therefore cannot stand.

The plaintiffs, therefore, are to have judgment for \$50.10.

The question of costs is reserved to be dealt with on a Chambers application.

## Supreme Court of Canada.

EXCHEQUER COURT.]

[15TH DECEMBER, 1902.]

## POWER v. GRIFFIN.

*Patent of invention—Manufacture—Extension of time.*

A patent of invention expires in two years from its date, or at the expiration of a lawful extension thereof, if the inventor has not commenced and continuously carried on its construction or manufacture so that any person desiring to use it could obtain it or cause it to be made.

A patent is not kept alive after two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it, if he has not commenced to manufacture.

*Smith v. Barter*, 2 Ex. C. R. 474, overruled on this point.

The power of extension beyond the two years given to the commissioner of patents, or his deputy, can only be exercised once.

*Quaere*: Can it be exercised by an acting deputy commissioner?

*W. Cassels*, K.C., and *A. W. Anglin*, for the appellant.

*J. G. Ridout*, for the respondent.

## DAVIDSON v. GEORGIAN BAY NAVIGATION CO.

*Ship—Navigation—Narrow channels—"White Law," Rule 24—Right of way.*

Rule 24 of the "White Law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

*Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned, but applies only to meeting vessels. Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.

The "Shenandoah" with a tow was ascending the St. Clair river in a fog and hugging the United States shore; the "Carmona" was coming down the river; and they sighted each other when a few hundred yards apart. They simultaneously gave the port signal, which was repeated by the "Carmona." The "Shenandoah" then gave the starboard signal, and steered accordingly. The "Carmona," thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah," but on going ahead again collided with the vessel in tow.

*Held*, reversing the judgment of a local Judge, 8 Ex. C. R. 1, that the "Shenandoah" was not in fault; but that, as the local Judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels, was committed while in the agonies of collision, the judgment as to her should be affirmed.

*W. Nesbitt, K.C., and F. A. Hough, for the appellant.*

*T. Mulvey, K.C., and M. J. O'Connor, for the respondents.*

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ONTARIO.]

[9TH DECEMBER, 1902.]

CHAUDIÈRE MACHINE CO. v. CANADA ATLANTIC  
R. W. CO.

*Nuisance—Trespass—Continuing damage.*

In 1888 the defendants ran their line through Britannia terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on that street, on which they had since carried on their foundry business. In 1900 they brought an action against the defendants, alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to the egress in consequence of such work.

*Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the pro-



party might have brought an action, in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiffs' action was brought, the latter could not be maintained.

Judgment of the Court below affirmed.

*A. B. Aylesworth*, K.C., and *T. McVeity*, for the appellants.

*G. F. Shepley*, K.C., and *J. Christie*, for the respondents.

[12TH DECEMBER, 1902.]

### GRANT v. FULLER.

*Will—Devise for life—Remainder to devisee's children—Estate tail.*

Land was devised to D. for life "and to her children, if any, at her death," if no children to testator's son and daughter. D. had no children when the will was made.

*Held*, that the devise to D. was not of an estate in tail, but on her death her children took the fee.

Judgment of the Court of Appeal, 1 O. W. R. 452, affirmed.

*John A. Robinson* and *M. J. O'Connor*, for the appellant.

*W. R. Riddell*, K.C., and *J. Cowan*, for the respondent.

### MYERS v. SAULT STE. MARIE PULP CO.

*Master and servant—Injury to servant—Negligence—Unguarded machinery—Proximate cause—Ontario Factories Act.*

The plaintiff, a workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step-ladder to get on a plank in front of the drier. The step-ladder was movable and placed close to a revolving cog-wheel. On returning from the drier on one occasion, another workman, accidentally or intentionally, removed the ladder as the plaintiff was about to step on it, and before he could recover his balance his leg was caught in the cog-wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded, and the ladder fastened to the floor; and

that the non-guarding and fastening was negligence of the defendants.

*Held*, affirming the judgment of the Court of Appeal, 3 O. L. R. 600, 22 Occ. N. 203, that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor, for which the defendants were liable.

*W. R. Riddell*, K.C., and *A. B. Colville*, for the appellants.

*W. M. Douglas*, K.C., for the respondents.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

Boyd, C.]

[4TH DECEMBER, 1902.]

GRAND HOTEL CO. OF CALEDONIA SPRINGS v.  
WILSON.

GRAND HOTEL CO. OF CALEDONIA SPRINGS  
v. TUNE.

*Trade name—Infringement of —“Caledonia water”—“Caledonia mineral water”—Geographical designation.*

The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, respecting the waters of which they had caused to be registered certain trade marks, and the names “Caledonia water” and “Caledonia mineral water.” The water, which was used medicinally and as a beverage, had, through the plaintiffs’ exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs, and near the springs a village, laid out on the ground many years before, had actually come into existence, where the plaintiffs had erected an hotel, and had procured a railway station and post office to be erected under the name “Caledonia Springs.” In 1898 L. & Co., who had purchased a lot about a quarter of a mile distant from the plaintiffs’ place, had, by sinking an artesian well, tapped springs, from which water flowed,

similar in some respects to the plaintiffs', which they supplied in barrels to their agents, as "water from the new springs at Caledonia," which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiffs'. One of the agents, T. & Co., had, at the time of the commencement of the action, been using labels thereon resembling the plaintiffs', and selling the water as Caledonia water, but this had never been sanctioned by L. & Co., and was at once abandoned.

*Held*, reversing the judgment of BOYD, C., 21 Occ. N. 524, 2 O. L. R. 322, MOSS, C.J.O., dissenting, that the defendants could not be restrained from using the word "Caledonia" as they did in designating the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co., and as against them the plaintiffs should only be allowed the costs of entering judgment by default.

W. E. Middleton, for the appellants.

F. Arnoldi, K.C., for the respondents.

FALCONBRIDGE, C. J.]

[24TH NOVEMBER, 1902.]

DAVIS v. WALKER.

Donatio mortis causa—Solicitor and client—Absence of independent advice—  
Invalidity of gift.

Where, at the time of the making of an alleged *donatio mortis causa*, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift cannot be supported.

There is no distinction in this respect between a gift *inter vivos* and a gift *mortis causa*.

Judgment of FALCONBRIDGE, C.J., affirmed; MACLENNAN, J.A., dissenting.

T. Langton, K.C., and W. R. Riddell, K.C., for the appellant.

E. S. Wigle, for the respondent.

FALCONBRIDGE, C.J.]

[24TH NOVEMBER, 1902.]

V

## McCLENAGHAN v. PERKINS.

*Executors and administrators—Claim by executor against estate—Matters occurring before death of deceased—Corroboration—Devise to executor—Whether in lieu of compensation—Negligent mismanagement—Compensation.*

The executor of a deceased person's estate was also the executor of an estate in which the deceased was beneficially interested. In passing his accounts in respect to the last named estate, after the deceased's death, the executor credited himself with having received for the deceased on account of her share in such last named estate a specified sum of money. On subsequently passing his accounts in respect to the deceased's estate, and being charged with this sum, as having been received by him for the deceased, he alleged that he had not then received it, but had in fact paid it out in small sums to the deceased during her lifetime.

*Held*, that this was not a matter occurring before the death of the deceased, and therefore the evidence of the executor to establish his contention did not require to be corroborated under s. 10 of the Evidence Act, R. S. O. 1897 c. 61.

A testatrix by her will devised to her brother certain lands free from incumbrances, with a direction for the payment out of general personal estate of any incumbrance thereon, and she appointed him her executor.

*Held*, that the devise was not given to him in his capacity of executor, but in his personal capacity, and therefore did not preclude him from claiming compensation for his services to the estate.

*Compton v. Blozham*, 2 Coll. 201, distinguished.

Where an executor has been guilty of acts of negligence, mismanagement, and breach of trust in his management of the estate, but there has been nothing of a dishonest or fraudulent character, and the losses resulting are capable of being compensated for, and made good in money, the executor is not to be deprived of compensation.

*T. A. Beament*, for the appellant.

*W. J. Code*, for the respondents.

FALCONBRIDGE, C.J.]

[26TH JANUARY, 1908.]

## FITZGERALD v. FITZGERALD.

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*Dower—Equitable estate—Voluntary conveyance by husband.*

It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate; a voluntary conveyance thereof, even though made with the object of preventing the wife acquiring any right to dower, being unimpeachable by her.

Judgment of FALCONBRIDGE, C.J., affirmed.

A. B. Aylesworth, K.C., and J. W. Bennet, for the appellant.

G. H. Watson, K.C., and E. B. Edwards, K.C., for the respondent.

MACMAHON, J.]

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[24TH NOVEMBER, 1902.]

## KEITH v. OTTAWA AND NEW YORK R. W. CO.

*Railway—Injury to passenger—Alighting from moving car—Negligence—Contributory negligence—Findings of jury—Damages.*

The fact of a passenger getting off a train while it is in motion is not in itself evidence of negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances.

Where a train scheduled to stop at a named station, did not, on arriving there, stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started, stumbled and fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court refused to interfere with their finding, or to reduce the damages awarded, \$1,000.

W. R. Riddell, K.C., and W. H. Curle, for the appellants.

W. H. Blake, K.C., for the respondent.

BRITTON, J.]

[26TH JANUARY, 1908.]

## DILLON v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

*Insurance—Life—Misstatement in application as to age—Evidence of bona fides—Admissibility—Burden of proof—Findings of jury.*

In an action on a policy of life insurance the main defence was that the insured in his application, made in 1891, stated that he was 41 years of age, whereas in fact he was 44. The evidence shewed that 44 was his actual age at the time. Evidence of statements made by the insured, many years before the application, tending to shew his belief that he was born in 1850, was rejected.

*Held*, that the evidence should have been admitted for the purpose of shewing that the statement in the application as to age was made in good faith, and without intention to deceive.

In answer to questions the jury found that the statement in the application that the insured was born in 1850, was untrue, and was material, but that the insured made the misstatement in good faith, believing it to be true, and without intention to deceive.

*Held*, that on these answers judgment should have been entered for the defendants, if the jury could not properly find that the statement was made in good faith and without intent to deceive; but, as the plaintiff was not allowed to elicit evidence on this point, there should be a new trial.

Where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intent to deceive; and it must lie upon the person seeking to uphold the contract to make proof of it.

Judgment of BRITTON, J., reversed.

*E. D. Armour*, K.C., and *R. B. Henderson*, for the appellants.

*I. B. Lucas* and *W. H. Wright*, for the respondent.

## IN CHAMBERS.

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[MOSS, J.A., 23RD OCTOBER, 1902.]

## OTTAWA GAS CO. v. CITY OF OTTAWA.

*Leave to appeal—Question of costs—Solicitor—Payment by salary—Taxation of costs against opposite party—Right to costs—Municipal corporation—By-law.*

The solicitor of a municipal corporation was appointed under the terms of a by-law which provided for his receiving a yearly salary of \$1,800 for all services performed by him, including costs of litigation incurred on behalf of the corporation, and any costs awarded to the corporation were to be paid over to the city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should be paid to the solicitor as part of his remuneration, in addition to his salary. After the passing of the amending by-law the corporation claimed to have the right to tax profit costs in an action against the corporation, which had been dismissed with costs by a judgment given before the passing of such amending by-law.

Leave to appeal to the Court of Appeal from an order of a Divisional Court (22 Occ. N. 408, 4 O. L. R. 656) refusing to allow such profit costs, having been moved for:—

*Held*, that, having regard to the litigation and the decisions on the subject, leave should not be granted.

*Seemle*, that the date of the judgment governed the plaintiffs' liability to costs.

*H. T. Beck*, for the plaintiffs.

*J. H. Moss*, for the defendants.

## HIGH COURT OF JUSTICE.

[BOYD, C., FALCONBRIDGE, C.J., 9TH FEBRUARY, 1903.]

## HAIGHT v. DANGERFIELD.

*Will—Construction—Estate for life—Remainder to heirs—"Then surviving."*

A testator devised land to his wife "during the full term of time that she remains my widow and unmarried," and subject thereto to two sons "during the full term of time of

their natural lives . . . and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike."

*Held* that the will gave a life estate for the joint lives of the two sons, with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons.

*James Bicknell*, K.C., and *George C. Thomson*, for the plaintiffs.

*W. Harold Barnum*, for the adult defendants.

*F. W. Harcourt*, for the infant defendants.

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[*STREET*, J., *BRITTON*, J., 9TH FEBRUARY, 1908.

### REX v. HAYES.

*Criminal law—Conviction for importing alien labourer—"Knowingly"—Conviction bad on its face—Amendment—Matter of substance—Evidence as to alienage—Person born abroad of British parents.*

Conviction of the defendant for that he did unlawfully prepay the transportation, and assist and encourage the importation and immigration of an alien and a foreigner from the United States into Canada under contract and agreement made previous thereto to perform labour and service in Canada by working at a factory, quashed as clearly bad on its face, inasmuch as the conviction did not state that the defendant "knowingly" did the acts charged, nor in fact did the information charge him with having "knowingly" done them, as required under 1 Edw. VII. c. 13, s. 3.

*Held*, also, that this omission from the information and conviction of one of the essential elements of the offence was not a mere irregularity or informality or insufficiency within the meaning of s. 889 of the Criminal Code.

It was not a matter of form merely, but of substance, and a fatal and incurable defect in the conviction.

*Semble*, also, that the person imported by the defendant was not an alien, but a British subject, the presumption from



the only facts in evidence being that he was born of British parents residing in the United States.

*G. H. Watson*, K.C., for the defendant.

*J. G. O'Donoghue*, for the prosecutor.

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[BOYD, C., 11TH DECEMBER, 1902.]

### ATTORNEY-GENERAL v. TORONTO GENERAL TRUSTS CORPORATION.

*Revenus—Succession duty—Provisions of will—Income only payable for life or years—When duty payable on corpus.*

The scheme of the Succession Duty Act, R. S. O. 1897 c. 24, is to provide a duty on succession to property by persons succeeding to estates and interests in property by testate or intestate title.

A testator by his will devised his estate to trustees upon trust to collect the income and apply it or such part as the trustees thought proper for the benefit of children and grandchildren for the period of 21 years after his death, and to pay over to the beneficiaries the whole income, without accumulations, for the period between the end of the 21 years and the death of the last surviving child.

*Held*, that there was a plainly marked out period in the future, not sooner than 21 years, when the corpus of the estate was to be divided; that there was a prior interest for life or years according to the event in fact, during which the trustee, standing *in loco parentis*, was entitled to the present income of the property until the time arrived when the corpus was to be divided; that when there is a present enjoyment there should be present payment of the duties based upon the estate or interest which is enjoyed; that there was a prior estate for years or for life, after which came the future estate in fee, not now to be levied upon for duty; and that only the income was presently liable to the payment of succession duty.

*G. F. Shepley*, K.C., for the Attorney-General.

*J. J. Foy*, K.C., for the trustees.

*E. F. B. Johnston*, K.C., for the beneficiaries.

✓ [BOYD, C., 10TH JANUARY, 1903.]

ATTORNEY-GENERAL FOR ONTARIO v. BROWN.

*Revenue—Succession duty—"Dutiable" property—Transfer of property before death—Donatio mortis causa—Contract for valuable consideration—Estoppel—Survivorship.*

The aggregate value of the estate of an intestate was \$12,877, and of this \$7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a *donatio mortis causa*, as established in *Brown v. Toronto General Trusts Corporation*, 32 O. R. 319.

*Held*, that the \$7,540 was not dutiable under the Succession Duty Act, R. S. O. 1897 c. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but one made in pursuance of a contractual obligation for value; and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract.

*Held*, also, that the \$7,540 did not pass by survivorship within the meaning of s. 4 (d) of R. S. O. 1897 c. 24.

A. B. Aylesworth, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendant Amanda Brown.

A. L. Colville, for the other defendants.

[MACMAHON, J., 14TH FEBRUARY, 1903.]

DAIGNEAU v. DAGENAIIS.

*Mortgage—Costs—Excessive demand—Tender.*

Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due.

A. E. Lussier, for the plaintiff.

T. McVeity, for the defendant.

[STREET, J., 29TH JANUARY, 1908.]

## PERRY v. CLERGUE.

*Constitutional law—Right to create and license ferries—Jura regalia—B. N.A. Act, s. 109—Dominion and Province—Ultra vires—Public harbour—River improvements.*

The right to create and license a ferry having been one of the *jura regalia*, or royalties, which belonged to the several Provinces of Canada, Nova Scotia, and New Brunswick at the union, continued to belong to the several Provinces after Confederation, as declared by s. 109 of the British North America Act; and therefore the lease of a ferry between the town of Sault Ste. Marie, in the Province of Ontario, and the town of Sault Ste. Marie, in the State of Michigan, granted by the Dominion Government in 1897, was declared to be invalid.

Although s.-s. 13 of s. 91 of the British North America Act gives exclusive legislative authority to the Parliament of the Dominion over ferries between a Province and any British or foreign country or between two Provinces, that authority does not carry with it any right to grant ferries.

*Held*, also, that, even if the St. Mary's river at the point in question were a public harbour which passed under s. 108 of the British North America Act to the Dominion, as far as the centre of the river where the international boundary was—nevertheless this would not give the Dominion Government any right to grant any exclusive right over it such as the ferry in question.

*Held*, however, that the St. Mary's river at the point in question is not a public harbour. It is difficult to say what it is that constitutes a harbour, but something more is necessary to convert an open river front into a public harbour, within the meaning of the British North America Act, than the erection along it of four or five wharves projecting beyond the shallows of the shore for the convenience of vessels receiving and discharging passengers and goods.

*Held*, likewise, that the existence of improvements in the river bed in front of the town of Sault Ste. Marie by the bridging operations carried on by the Dominion Government, which river improvements belonged to the Dominion Government, afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government.

The Dominion Parliament or Government have undoubtedly a right to make laws or rules with regard to the ferry in question or other ferries, for the purpose of regulating

them, and of preventing them from interfering with public harbours and river improvements of the Dominion.

The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company authorizes it, for the purposes of its undertaking, to acquire and run steam and other vessels for cargo and passengers upon any navigable water which its railway may connect with.

*Held*, that under the very large and general words of this clause the railway company were not bound to restrict the passengers and cargo transported by their vessels to persons and goods intended to be carried on their railway line.

*G. H. Watson*, K.C., for the plaintiffs.

*W. Nesbitt*, K.C., and *J. E. Irving*, for the defendants.

*W. R. Riddell*, K.C., for the Attorney-General for Ontario.

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[BRITTON, J., 29TH DECEMBER, 1902.]

### KING v. CITY OF TORONTO.

Municipal corporations—Power of council to submit questions to electors—  
Proposed expenditure of money for sanatorium—Intention to apply to  
Legislature—Injunction.

There is nothing in the Municipal Act permitting a municipal council to take a plebiscite, and there is no express prohibition against doing so.

Taking a vote of the electors upon questions or upon authorized by-laws is open to grave objections. And where a council sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, and, if favourable, to use the result as an argument in attempting to obtain for the council legislative authority to make the grant, was restrained by injunction.

*Helm v. Town of Port Hope*, 22 Gr. 273, followed.

*Wallace Nesbitt*, K.C., and *J. H. Denton*, for the plaintiff.

*J. S. Fullerton*, K.C., and *W. C. Chisholm*, for the defendants.

[BRITTON, J., 6TH JANUARY, 1908.]

## SMITH v. CAREY.

*Penalties—Ontario Election Act—Person voting knowing that he had no right to vote—Wilfully voting without qualification—Agent at poll—Voting under certificate—Neglect to take oath of qualification—Reduction of penalty.*

The defendant, having shortly before an election for the Legislative Assembly of Ontario removed from his farm in the neighbourhood of a city into the city itself, applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the sub-division in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote.

*Held*, that the defendant was not liable to the penalty imposed by s. 168 of the Ontario Election Act, R. S. O. 1897 c. 9, for voting knowing that he had no right to vote.

*South Riding County of Perth*, 2 Ont. Elec. Cas. 30, followed.

2. That the defendant was not liable to the penalty imposed by s. 181 of the Act for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote.

3. That the defendant was liable to the penalty of \$400 imposed by s. 94s.-s. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R. S. O. 1897 c. 108 should be applied, and the penalty reduced to \$40.

*John McIntyre*, K.C., and *E. H. Smythe*, K.C., for the plaintiff.

*J. L. Whiting*, K.C., and *J. McDonald Mowat*, for the defendant.

[BRITTON, J., 6TH JANUARY, 1903.]

## CAREY v. SMITH.

*Penalties—Ontario Election Act—Bribery—Recovery of penalty by action—Agent at poll—Certificate—Neglect to take oath of qualification—Reduction of penalty.*

An action will not lie under s. 195 of the Ontario Election Act, R. S. O. 1897 c. 9, for the pecuniary penalty for the offence of bribery prescribed by s. 159, s.-s. 2, as amended by 63 V. c. 4, s. 21, until after conviction.

The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs.

The defendant was held liable to a penalty of \$400 under s. 94, s.-s. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was reduced to \$40, as in the preceding case.

*J. L. Whiting, K.C., and J. McDonald Mowat, for the plaintiff.*

*John McIntyre, K.C., and E. H. Smythe, K.C., for the defendant.*

## IN CHAMBERS.

[MEREDITH, C.J., 12TH FEBRUARY, 1903.]

## REX EX REL. WARR v. WALSH.

*Municipal elections—Councillors—Time of holding nomination—Irregularity—Saving clause.*

Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than 5,000 persons, and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon.

*Semble*, that an error in this respect as to the time and place of the nomination would come within the curative provisions of s. 204 of the Municipal Act, R. S. O. 1897 c. 223, and would not be a fatal objection to the validity of the subsequent election.

Judgment of the Master in Chambers reversed.

*T. J. Blain and D. O. Cameron, for the appellants.*

*E. G. Graham, for the relator.*

[STREET, J., 26TH JANUARY, 1908.]

*In re* HANNAH HUNT.

*Will—Legatee predeceasing testatrix—Rights of husband and children.*

A testatrix by will dated 23rd March, 1901, directed her estate to be divided into four equal shares and one share to be paid to each of her four children. One of the four children predeceased her, intestate, leaving a husband and two infant children.

*Held*, that by virtue of s. 36 of the Wills Act, R. S. O. 1897 c. 128, the husband took one-third of a one-fourth share in the estate of the testatrix, the two infant children taking the rest.

*F. S. Mearns*, for John Jewell, the husband, and the executors.

*F. W. Harcourt*, for the infants.

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## NOVA SCOTIA.

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*In the Supreme Court.*

[FULL COURT, 14TH FEBRUARY, 1908.]

REX v. McDONALD.

*Certiorari—Application to quash for delay—Defendant's notice of intention to proceed.*

The prosecutor moved the Court to quash the *certiorari*, and failed because he had not given a month's notice of intention to proceed (*ante* 17.) The motion was renewed.

*J. A. Chisholm*, for the prosecutor.

*J. J. Power*, for the defendant.

The judgment of the Court was delivered by

MEAGHER, J.—The prosecutor moved some weeks ago to quash the *certiorari* in the cause on the ground that more than a year had elapsed since its issue and no progress had meanwhile been made under it. The motion was refused upon the authority of *McIsaac v. Broad Cove Coal Co.*, 31 N.S. Reps. 108, because a month's notice of intention to proceed had not been given. Leave was granted to move again, and we have now to determine the new motion.

In the meantime the defendant's solicitor gave notice of a motion to be made at the coming March term to quash the conviction. The principal ground urged against the present motion was that, inasmuch as the defendant had given notice of motion to quash, before the present motion was launched, he was entitled to have it heard. No reasons were given to account for the delay. In the absence of these and having regard to the long period of time which has elapsed since the *certiorari* was granted, it may be safely assumed, as was said by Lord Denman in *Rex v. Higgins*, 5 A. & E. 354, "that justice was not the object in suing out the *certiorari*."

*Regina v. Nichols*, 24 N. S. Reps. 151, governs the motion before us. The facts are substantially the same, and the main ground now urged by the defendant was unsuccessfully pressed there.

The delay in the present case constituted a clear breach of the recognizance, which required the defendant to prosecute his *certiorari* "with effect and without wilful or affected delay." The defendant has no claim for further indulgence. The first motion would have succeeded but for the technical objection taken, and nothing has occurred since then to deprive the prosecutor of the right he then had to have the writ quashed.

The defendant's position, and that of a defendant in an action who has not pleaded within the prescribed time, are wholly dissimilar. A defendant may plead to an action so long as the avenue to the Court is not closed against him; his right to a trial clearly subsists. But this defendant was only entitled to a limited time, by the terms of his own recognizance, within which to prosecute his writ. Once he passes that limit he is not entitled to any further time.

The motion to quash the writ will prevail and with costs.

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## MANITOBA.

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### In the King's Bench.

[FULL COURT, 20TH DECEMBER, 1902.]

*In re* BRAUN, BRAUN v. BRAUN.

*Executors and administrators—Business carried on by executor or estate—Purchase of goods—Claim by vendor—Administration order—Estoppel—Judgment—Statute of Limitations—Interest.*

John N. Braun, who carried on business as a hotelkeeper, died, having appointed Henry Braun as his executor, and



devised and bequeathed to him all his estate for the benefit of his, testator's, wife and children, with power of sale and investment, or to carry on the business for the benefit of the wife and children. Henry Braun continued the business for the benefit of the estate until March, 1892, when the hotel was burned.

In carrying on the business for the estate he purchased goods from Velie & Co., for which there was owing to that firm at the time of the discontinuance \$141.12. Subsequently Henry Braun dealt with the same firm, and obtained goods for his own business, which he had entered upon after the fire.

In May, 1892, an order was made for the administration of the estate. In May, 1893, Velie & Co. sued Henry Braun to recover a balance of \$153.17 as owing for all of the goods supplied, after allowing credit for payments made after the furnishing of the last of the goods.

The County Court Judge made a special finding that the first mentioned goods were sold to the estate of J. N. Braun and not to the defendant. He applied the payments on the goods last supplied and gave judgment for the plaintiffs for \$12.05.

In April, 1894, an order was made upon the consent of the widow, approving of a settlement proposed by the executor, as the estate was insolvent and very largely indebted to him. It contained directions for carrying out the settlement, and an order that the Master should settle all claims against the estate, and that the petitioner, the executor, should indemnify the estate from the payment of the debts.

The proposed adjudication upon the claims of creditors was never completed, but in 1901 George Velie, claiming as assignee of Velie & Co., took into the Master's office a claim for \$141.12 for the goods supplied while H. Braun was carrying on the business for the estate; the Master allowed the claim in full with interest amounting to \$73.43.

Among other evidence proof of the proceedings in the County Court was put in: H. Braun gave evidence at that trial to the effect that he ordered the goods on account of the estate only, and not on his own account.

The executor appealed from the decision of the Master; his appeal was dismissed by RICHARDS, J., and he then appealed to the full Court.

It was argued that, by the order and supply of the goods, no charge was created upon the estate, but only a personal

liability of the executor, which the vendors were estopped by the County Court judgment from setting up, and which, in any event, was barred by the Statute of Limitations.

*Held*, that, under the circumstances, the claim of Velie & Co. was a claim or demand against the estate, upon which the Master was to adjudicate under the terms of the order of 1894, and he was bound to adjudicate upon it on the basis that there were assets available to meet it. The Statute of Limitations could not afford any answer to the claim. The claim was not barred when the order of 1894 was made. The executor became then bound to pay it, and the Court, so long as the proceedings were pending, could enforce the liability.

Interest would be allowable from the making of the order of 1894.

G. A. Elliott, for Velie & Co.

H. M. Howell, K.C., and J. S. Hough, K.C., for Braun.

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[RICHARDS, J., 29TH JANUARY, 1908.]

#### GIBBINS v. METCALFE.

*Discovery—Examination of party—Questions as to indemnity for costs of suit—Disclosing names of witnesses.*

Motion on behalf of one of the defendants to compel the plaintiff to answer certain questions which on his examination for discovery he had refused to answer.

Some of the questions related to whether the plaintiff had received from persons or corporations, not parties to the action, assistance or promise of assistance or indemnity as to the costs of the suit, or as to whether the plaintiff before action consulted with such other persons as to his bringing the suit.

*Held*, that such questions were not admissible as "touching the matters in question in the action."

The first four questions were within the rule of law that a party is not compellable on such an examination to disclose the names of his witnesses.

Motion dismissed with costs in the cause to plaintiff in any event against the defendant moving.

J. A. M. Aikins, K.C., for the plaintiff.

J. H. Munson, K.C., for the applicant.

## Exchequer Court of Canada.

[BURBIDGE, J., 17TH NOVEMBER, 1902.]

### MCGOLDRICK v. THE KING.

*Crown—Expropriation of lands—Leasehold property—Tenant's improvements—Expense of removal to new premises—Compensation.*

The suppliant was tenant of certain buildings and wharves erected upon lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk dealer. The terms for which the leases were made had expired at the time of the expropriation of the lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisal, or of renewing the leases on the same terms for a further term not less than three years. No such appraisal had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence shewed that the lessor had no present intention of paying for the improvements and of resuming possession of the property.

*Held*, that, in addition to the value of his improvements, the suppliant should be allowed compensation for the value under all the circumstances of his possession under the leases at the date of the expropriation.

*L. A. Currey, K.C.*, for the suppliant.

*E. H. McAlpine, K.C.*, for the Crown.

### ✓ REX v. TURNBULL REAL ESTATE CO.

*Crown—Expropriation of lands—Prospective value for purposes other than present use—Assessed value.*

Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy

purposes, such prospective value was taken into consideration in assessing compensation.

2. In assessing compensation in this case the Court looked at the assessed value of the lands, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken.

*E. H. McAlpine*, K.C., for the Crown.

*S. Alward*, K.C., for the defendants.

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[5TH DECEMBER, 1902.]

### DOMINION OF CANADA v. PROVINCE OF ONTARIO

*Interest—Disputed accounts between Federal and Provincial Governments—Award of arbitrators—Interest on award—Agreement as to date from which interest is to be computed.*

In certain arbitration proceedings between the Dominion of Canada and the Provinces of Ontario and Quebec, the first mentioned Province was found to be indebted to the Dominion in the sum of \$1,815,848.59 on the 31st December, 1892. While proceedings before the arbitrators were pending, correspondence between the Dominion and the two Provinces, concerning the rate per cent. and the time from which interest was to run on the amount of the award, was opened by the deputy minister of finance for Canada in a letter to the treasurer of Quebec of the 21st December, 1892, in which, among other things, he asked that the Province of Quebec should agree to pay to the Dominion, from the 1st January, 1894, simple interest at five per cent. upon the balances in account standing in favour of the Dominion on the 31st December, 1893. Quebec declined to accede to this proposal, and the correspondence in the matter was eventually closed by a letter from the assistant treasurer of Quebec to the deputy minister of finance for Canada of the 6th July, 1894, in which he, in effect, stated that the interest to be paid by Quebec upon any balances found by the arbitrators to be due on the 31st December, 1892, and existing on the 1st July, 1894, should be at the rate of four per cent.. Similar correspondence between the Dominion Government and the Province of Ontario was concluded by a letter of the 18th August, 1894, from the acting deputy attorney-general for that Province to the acting deputy of the minister of finance for Canada, stating, in effect, that Ontario accepts the same

conditions as Quebec in respect of the payment of the subsidy. Prior to the date of this letter the Premier of Ontario had addressed a letter to the Premier of the Dominion, dated 26th July, 1894, as follows:

"I understand that your Government has paid to Quebec the subsidy due on the 1st July instant, on the consent of the Government to pay four per cent. on any balance of account that might be found between the Province and the Dominion, such interest to be reckoned from and after the said 1st of July, 1894. I presume this means the balance of account in respect of the items which have already been brought before the arbitrators, and which now stand for judgment. This Government is willing to accept the subsidy on these terms."

Upon a case stated to determine whether interest was payable by the Province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only:—

*Held*, that the correspondence shewed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned.

*W. D. Hogg*, K.C., for the Dominion.

*Æmilius Irving*, K.C., and *G. F. Shepley*, K.C., for the Province.

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[26TH JANUARY, 1908.]

# ATLANTIC AND LAKE SUPERIOR R. W. CO. v. THE KING.

*Security for costs—Petition of right—Application by Crown—Limited company—25 & 26 V. (U.K.) c. 89, s. 69—Practice.*

Section 69 of the Companies Act, 1862, 25 & 26 V. (U.K.) c. 89, provides that, where a limited company is plaintiff in any action, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

By s. 7 of the English Petition of Right Act, 23 & 24 V. c. 34, it is, among other things, provided that the statutes and practice in force in personal actions between subject and

subject shall, unless the Court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England.

In a proceeding by petition of right in the Exchequer Court application was made for security for costs under the provision first mentioned. There was nothing to shew that it had ever been acted on in a proceeding by petition of right in England.

*Held*, that the question of the application of the provision first mentioned to such cases was not sufficiently free from doubt to justify the granting of the application.

*E. L. Newcombe*, K.C., for the Crown.

*W. D. Hogg*, K.C., for the suppliants.

[14TH FEBRUARY, 1903.]

### SPILLING v. RYALL.

*Trade mark—Cigars—Infringement—Representations of the King and the royal arms—Validity—User before registration—R. S. C. c. 63, s. 8—Declaration signed by agent.*

A label, as applied to boxes containing cigars, bearing upon it in an oval form a vignette of King Edward VII., with a coat of arms on one side, and a marine view on the other, surmounted by the words "Our King," and with the words "Edward VII." underneath, constitutes a good trade mark in Canada, and may be infringed by the impression, upon boxes containing cigars, of a fac-simile of the royal arms surmounted by the words "King Edward."

2. The English rule prohibiting the use of the royal arms, representations of His Majesty, or of any member of the royal family, of the royal crown, or the national arms or flags of Great Britain, as the subjects of trade marks, is not in force in Canada.

3. It is not essential to the validity of a trade mark registered in Canada that the person registering the same should have used it before obtaining registration. The registration must, however, in such a case, be followed by use, if the proprietor wishes to retain his right to the trade mark. In this respect there is no difference between the law of Canada and the law of England.

4. The declaration required from the proprietor of a trade mark by s. 8 of the Trade Marks and Design Act, R. S. C. c. 63, may be signed by his duly authorized attorney or agent.

*R. G. Code*, for the plaintiffs.

*A. H. Clarke*, K.C., for the defendant.

[7TH MARCH, 1903.]

## THE "DAVID WALLACE" v. BAIN.

*Ship—Foreign vessel—Necessaries—Charterparty—Authority of master—  
Liability of owner.*

The action was brought by the plaintiff against a foreign vessel and owners for necessities supplied on her account at a Canadian port. At the time the necessities were supplied the vessel was under charter, the owner having by the charterparty transferred to the charterers the possession and control of the vessel. The charterers appointed the master, and he for them the crew. The charterers paid the wages of the master and crew and the running and other expenses of the vessel. The plaintiff knew that the vessel was under charter; but he did not know the terms of the charterparty. On the trial there was a conflict of testimony between the plaintiff on the one hand, and the master of the vessel and the port captain or agent of the charterers on the other hand, as to whether or not the necessities were supplied on the order of the master on the credit of the vessel and owners, or on his order or that of the port captain on the credit of the charterers. A local Judge in Admiralty by whom the case was tried found that the necessities were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor.

*Held*, on appeal, that the plaintiff ought, under the circumstances, to have the benefit of the finding in his favour, but that, as the master was the servant and agent of the charterers, and not of the owner, he had no authority to pledge the latter's credit, and that, as the owner was not liable for such necessities, the vessel could not be made liable.

An action for necessities at the suit of the person who supplies them cannot be maintained against the ship if the owner of the ship is not the debtor.

Where the owner of the ship is the debtor, the action cannot be maintained against her if the necessities are supplied at the port to which the ship belongs; or if at the time of the institution of the action any owner or part owner of the ship is domiciled in Canada. (The Admiralty Courts Act, 1861, s. 5; The Colonial Courts of Admiralty Act, 1890, s. 2 (3) (a).)

Where by the charterparty the owner transfers the possession and control of the ship to a charterer, and the latter appoints the master and crew and pays their wages and other expenses, the master in incurring a debt for necessities is the

agent and servant of the charterer and not the agent or servant of the owner. In such a case the owner is not the debtor, and an action for such necessities cannot be maintained against the ship.

The want of notice of the terms of the charterparty in such a trial is not material, notice of the charterparty not being essential where the owner completely divests himself of the possession and control of the ship.

*J. B. Kenney*, for the appellant.

*R. G. Code*, for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

FALCONBRIDGE, C.J.]

[26TH JANUARY, 1903.]

*V* HOLDEN v. GRAND TRUNK R. W. CO.

*Master and servant—Injury to servant—Disobedience to orders—Railway—Death of engine-driver—Negligence—Contributory negligence—Signals.*

This was an action by the widow of one of the defendants' engine-drivers, who lost his life by reason, as alleged, of the defendants' negligence. It appeared that at the point where the accident occurred there was a switch for a siding from the defendants' main line running up to the works of a smelting company. Under the orders of the Railway Committee of the Privy Council an interlocking, derailing, and signal apparatus was to be constructed and operated at this point. Such apparatus, if complete and in good working order, would enable workmen in a tower or cabin at some distance from the rails, by means of a mechanical device, to move or shift and lock securely the points of the switch, and at the same time to display the signals which were intended to guide the engine-drivers in the management of their trains, by indicating whether the switch or the main line was open. One of the signals was known as the home signal, situate 500 feet from the switch, and containing two arms of which the upper would be dropped if it indicated that the main line was open, while if the lower was dropped, it indicated that the siding was



open. If both were dropped, it would indicate nothing, the one being inconsistent with the other. On the morning of the accident, the defendants' signal engineer reporting the apparatus as ready to be operated, the plaintiff's husband with other engine-drivers was notified that it was in working order, and that all trains should be governed by rules governing interlocking and derailling appliances. As a fact, however, the apparatus was not in working order, and when the train, of which the plaintiff's husband was the driver, approached the point in question, both arms of the home signal were down. A switch-man whom the defendants sent to take charge of the interlocker failed to give notice to his superiors as to the interlocker not being in working order, though he remained at the switch all day, and had flag signals to use in case of necessity. When the train in question approached, this switch-man asked the men who were still working on the interlocking apparatus if it was all right, and they replied that it was all right, meaning that the switch had been set for the main line; accordingly he did not flag the train to stop. As a matter of fact, the switch had not been properly fastened, and the engine passing over the point displaced it, and the train was derailed and thrown down the embankment, and the driver was killed.

The rules governing the conduct of engine-drivers provided, that when in doubt as to the meaning of a signal they must stop and ascertain the cause, also that a signal improperly displayed must be regarded as a danger signal, and that in all cases of doubt or uncertainty they were to take the safe course and run no risks. There were also special instructions on the employees' time table, that if an interlocker was out of order, trains were to be flagged through by the signalman.

*Held*, that the plaintiff was properly nonsuited, in that her husband could not have maintained an action on account of his negligence, if he had survived, because he had disobeyed his orders as contained in the rules, and had proceeded with his train in spite of the condition of the home signal. He could not properly regard the main line signal as a safety signal, because the siding signal as displayed was inconsistent with it.

Judgment of FALCONBRIDGE, C.J., affirmed.

*G. Lynch-Staunton*, K.C., for the plaintiff.

*W. Cassels*, K.C., and *W. Nesbitt*, K.C., for the defendants.

## HIGH COURT OF JUSTICE.

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[BOYD, C., MEREDITH, J., 22ND DECEMBER, 1908.]

## DUNLOP PNEUMATIC TIRE CO. v. RYCKMAN.

*Pleading—Counterclaim—Exclusion of—Defendants to counterclaim out of jurisdiction—Foreign trade mark—Conspiracy to defraud.*

The plaintiffs, an English company, brought an action against the defendants in Ontario to restrain them from exporting goods to and interfering with their business in Australia, in breach of a certain agreement, and the defendants, besides setting up as a defence certain breaches of the agreement by the plaintiffs, counterclaimed against the plaintiffs for damages for such breaches, for a declaration of their rights as to trade with Australia and other countries, and a rectification of the agreement to make it conform to the representations of the plaintiffs. The defendants also counterclaimed against the plaintiffs, G. and P., two persons not originally parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trade marks they were entitled to in Australia under the agreement by the plaintiffs, assigning the trade marks to G. and P., who, with the Australian company, fraudulently put in force the trade mark laws of Australia, and prevented the defendants exporting their goods to Australia and obstructed them in their business.

*Held*, that the claims made in the counterclaim against the plaintiffs alone, were proper subjects of a counterclaim in the action; but that there was no such intimate connection between the subject of the action and the subject of the counterclaim against the four parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action.

*South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, followed.

Order of STREET, J., reversing in part order of Master in Chambers, affirmed.

G. F. Shepley, K.C., and C. W. Kerr, for the appellants.

A. B. Aylesworth, K.C., W. M. Douglas, K.C., and John Greer, for the respondents.

[STREET, J., BRITTON, J., 28TH FEBRUARY, 1903.]

## ✓ WHITESELL v. REECE.

*Waste—Charge of annuity—Life tenant and remainderman—Apportionment—Damages—Subrogation.*

A testator seized in fee of land, subject to a mortgage, to secure an annuity for his wife, devised the land to one for life, with remainder over in fee. After his death, the life tenant paid the annuity to the widow. She also sold the timber on the land, and the purchaser having begun to cut the timber, this action was begun by the remainderman to restrain waste. The life tenant contended that she was entitled to be subrogated to the rights of the mortgagee in respect to so much of the annuity as she had paid, and that being so subrogated, the land was an insufficient security for her claim, and that she therefore had a right to cut down the timber.

*Held*, following *Yates v. Yates*, 28 Beav. 637, that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance, in the proportion which the value of the life estate bore to the value of the reversion.

*Held*, also, that, on the evidence, the land was adequate security for the claim of the life tenant against it in that regard, and that the purchaser of the timber having purchased in good faith, an injunction could not be granted, but the life tenant was liable for damages in respect of the timber cut.

Judgment of FALCONBRIDGE, C.J., affirmed.

*J. A. Robinson*, for the defendants.

*D. J. Donahue*, K.C., for the plaintiffs.

[FALCONBRIDGE, C. J., 27TH DECEMBER, 1902.]

## ✓ BODWELL v. McNIVEN.

*Specific performance—Contract for purchase of land—Taking possession—Acts constituting part performance.*

Possession is part performance of a contract for the sale and purchase of land both by and against a stranger and the owner.

On negotiations for the purchase of land the agent of the plaintiff, vendor, told the defendant, purchaser, that the lot was his. The defendant went on and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase.

*Held*, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to the usual judgment for specific performance.

*J. C. Hegler, K.C., and J. H. Hegler, for the plaintiff.*

*J. M. McEvoy and J. L. Paterson, for the defendant.*

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[STREET, J., 7TH JANUARY, 1903.]

SMITH v. HUGHES.

*Specific performance—Sale of land—Contract by agent of purchaser—Action by agent—Delay of purchaser—Resale by purchaser—Right of sub-purchaser to join vendor as party.*

Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract.

Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude upon pain of losing them.

The owner of land of that character on the 1st May, 1900, contracted to sell it to H., but was never paid anything upon the purchase money, although \$50 was to be paid down, and \$200 in six months, to be secured by H.'s note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff acting for an unnamed principal, and the owner was willing to carry out the resale. In September and October, 1900, there was some correspondence about the title, but after that until the 3rd April, 1901, the plaintiff's principal did nothing. On that day he sent the owner a conveyance of the land for execution, but the owner tore it up and said that owing to the delay he would not carry out the contract. On the 9th April, 1901, the plaintiff's principal brought this action, in the name of the plaintiff, for specific performance of the contract for resale, against

H. alone, but took no other steps until the 24th October, 1901, when he obtained an order adding the owner as a defendant, and then served the writ on both defendants. There was such further delay in the prosecution of the action that it was not tried till December, 1902.

*Held*, that the whole course of proceedings on the part of the plaintiff's principal shewed that he had been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate; and the action should be dismissed as against both defendants.

*Held*, that the owner was properly joined as a defendant; the foundation of the right against him being that the plaintiff or his principal was the equitable owner under his contract with H. of H.'s rights against the owner of the land, and might join the latter upon offering to perform H.'s contract.

*A. B. Aylesworth, K.C., and J. E. Irving*, for the plaintiff.

*M. McFadden*, for the defendant Hughes.

*W. R. Riddell, K.C., and P. T. Rowland*, for the defendant Plummer.

[STREET, J., 8TH JANUARY, 1903.]

### KING v. MATTHEWS.

*Municipal corporations—Local improvements—Reconstruction of sidewalk—Payment for out of general funds—Illegality—Liability of councillors sanctioning payment—Trustees—Breach of trust—Excuse—Relieving statute.*

By a special Act of the Legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in ss. 612 and 624 of the Consolidated Municipal Act, 1883, should be by special assessment on the property benefited and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by s. 612.

In 1886 a board sidewalk was laid upon one of the streets of the town in accordance with a by-law, and paid for by a

special assessment upon the properties fronting upon it. A portion of the sidewalk so laid was not much used, and had never been repaired, and in 1902 was out of repair and dangerous. The remainder had been more used, had been repaired from time to time by the council at the general expense, and in 1902 was in a good state of repair. In that year the agent of the owners of the property fronting on the part of the sidewalk that was out of repair threatened proceedings to compel the council to put it in repair, and, as there was pressing need that it should be put into a state in which it would not be dangerous to the public, the chairman of the board of works directed the corporation foreman to proceed at once to put it in a good state of repair, and this was done by taking up the old sidewalk altogether, laying down new stringers, using such of the boards of the old sidewalk as were good, and replacing those which were bad with new ones. This work was paid for out of the general funds of the town.

In an action by a ratepayer, on behalf of all ratepayers other than the defendants, against the members of the council who sanctioned the payment for this improvement, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof.

*Held*, that the members of the council who were sued, having acted in good faith and under the bona fide belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably and were entitled to be excused for the alleged breach of trust.

*Semble*, that 62 V. (2) c. 15, s. 1, applied to these defendants; but, if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity.

*H. L. Drayton and D. Mills*, for the plaintiff.

*N. W. Rowell, K.C., and W. F. Langworthy*, for the defendants.

[BRITTON, J., 16TH FEBRUARY, 1908.]

## HUTCHINSON v. McCURRY.

*Foreign law—Code of Civil Procedure in Quebec—Recovery of costs—"Distraction"—Solicitor's right to recover without intervention of client—Interest.*

"Distraction of costs," as provided for in s. 553 of the Code of Civil Procedure in the Province of Quebec, is the diverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled.

The plaintiffs were the attorneys on the record for one R., against whom an action was brought in the Province of Quebec by the defendant, and an interlocutory motion therein had been dismissed with costs, taxed at \$238.20 and judgment entered therefor in the Superior Court at Montreal.

*Held*, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario, without the intervention of their client.

*Quære*, as to interest on the account.

*W. E. Middleton* and *W. R. Cavell*, for the plaintiffs.

*C. E. Hewson*, K.C., for the defendant.

[BRITTON, J., 17TH FEBRUARY, 1908.]

## FLETT v. COULTER.

*Negligence—Horse on highway—Injury to child.*

The defendant's horse being on the highway, a boy of twelve years of age approached to catch him by taking hold of a rope then around his neck, when the boy was kicked and injured. There was no evidence that the defendant knew that the horse was accustomed to stray or had any vicious propensity, nor was the horse shewn to have such fault, and there was evidence that the horse had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence and fully understood the risk he ran.

In an action by the boy and his father:—

*Held*, that they could not recover.

*Patterson v. Fanning*, 2 O. L. R. 462, distinguished.

*J. G. O'Donoghue*, for the plaintiffs.

*S. B. Woods*, for the defendant.

## IN CHAMBERS.

[MEREDITH, C.J., 2ND MARCH, 1908.]

## SMERLING v. KENNEDY.

*Security for costs—Præcipe order—Waiver.*

Where it is stated in the writ of summons that the plaintiff resides out of the jurisdiction, the defendant may, even after delivering his defence, obtain the usual præcipe order for security for costs.

*W. Proudfoot*, K.C., for the plaintiff.

*J. H. Moss*, for the defendant.

[FALCONBRIDGE, C.J., 22ND DECEMBER, 1902.]

## HAY v. BINGHAM.

*Defamation—Pleading—Statement of claim—Setting out whole newspaper article—Parts not referring to plaintiff—Innuendo.*

The very words complained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action; it is not sufficient to give the substance or purport, with innuendoes; it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial and the defendant is entitled to have the whole of it read, the plaintiff is entitled to set out in the statement of claim the whole article complained of.

*Held*, also, that certain words set out in another paragraph, which did not refer to the plaintiff, and tendered an issue not material, which might be embarrassing, should be struck out.

*Deyo v. Brondage*, 13 How. Pr. 221, referred to.

Order of a local Master varied.

*Taylor McVeily*, for the plaintiff.

*Glyn Osler*, for the defendant.



[STREET, J., 30TH JANUARY, 1903..

*In re O'SHEA.**Will—Construction—Devise of land—Direction to devisees to maintain sisters.*

A testator devised his farm to his two sons, share and share alike, but directed that they should be bound to keep their two sisters until they married, in a suitable manner, free of expense.

*Held*, that the sons were bound to give their sisters a home, but were not bound to furnish their sisters with money on which they could live apart from them.

*G. Edmison*, K.C., for the executors and beneficiaries except *S. O'Shea*.

*R. R. Hall*, for *S. O'Shea*.

[MEREDITH, J., 17TH FEBRUARY, 1903.

**CAMPBELL v. SCOTT.***Discovery—Examination of defendants—One defendant withdrawing after being sworn—Order to appear again—Excuse.*

A party to an action subpoenaed for examination for discovery before a special examiner and paid his conduct money for the day may be compelled to attend and testify in the same manner as a witness.

One of four defendants, all of whom were subpoenaed for half past ten in the morning and attended and were sworn, after being excluded from the examiner's chambers, waited while the others were being separately examined until after three in the afternoon, and then, without communicating with the examiner, went away and did not attend for examination.

*Held*, that a local Judge's order requiring him to attend again for examination was right.

*J. P. Mabey*, K.C., for the defendant *MacTavish*.

*J. H. Moss*, for the plaintiff.

[BRITTON, J., 9TH FEBRUARY, 1908.]

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McKELVEY v. CHILMAN.*Costs—Scale of—Trespass to land—Value of land—Payment of \$1 into Court—Acceptance by plaintiff.*

In an action for trespass to land, valued at over \$200, in which the plaintiff claimed \$1,000 damages, and no question of title to land was raised, the defendant paid \$1 into Court, and the plaintiff accepted it.

*Held*, that the plaintiff was entitled to his costs on the High Court scale.

*Babcock v. Standish*, 19 P. R. 195, followed.

*Chick v. Toronto Electric Light Co.*, 12 P. R. 58, and *Tobin v. McGillis*, *ib.* 60 n., commented on.

*James Dickson*, for the plaintiff.

*J. L. Counsell*, for the defendant.

[BRITTON, J., 9TH FEBRUARY, 1908.]

## LOVELL v. PHILLIPS.

*Costs—Scale of—Jurisdiction of County Court—Ascertainment of amount—Action for price of goods—Reduction of claim by trial Judge.*

In an action in the High Court for \$340, the balance of a \$790 account for logs sold by the plaintiff to the defendant. \$450 of which was paid before action, the trial Judge found that the sale was made as contended by the plaintiff, but reduced the amount by \$20 for some logs not received by defendant.

*Held*, on an appeal from the ruling of a taxing officer, that the plaintiff was entitled only to County Court costs, and the defendant to a set-off; the sum of \$340 being an ascertained amount, the reduction of it by the trial Judge did not affect the ascertainment.

*Brown v. Hose*, 14 P. R. 3, distinguished.

*S. B. Woods*, for the plaintiff.

*H. D. Gamble*, for the defendant.

[BRITTON, J., 14TH MARCH, 1903.

*In re* MACKEY.*Administrators pendente lite—Investment of moneys—Trustee Act—Trustee Investment Act.*

Motion by J. de St. Denis Lemoine and M. J. Gorman, administrators *pendente lite* of the estate of William Mackey, deceased, upon notice to the next of kin, for an order declaring that they were empowered to invest moneys in their hands during the pendency of litigation concerning the will of the deceased, in securities authorized by the Trustee Investment Act. The deceased died on the 1st December, 1902, leaving an estate of \$1,200,000, and appointing the applicants executors. An action was pending in the High Court, in which the validity of the will was to be tried, and in the meantime the Surrogate Court appointed the executors administrators *pendente lite*. They had received a large amount of money, which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged.

M. J. Gorman, K.C., for the applicants, referred to *Galivan v. Evans*, 1 B. & B. 191, in which it was held that the position of an administrator *pendente lite* with regard to investments, differed from that of an executor or trustee, and that the former could not be held liable for interest on money in his hands pending the litigation.

BRITTON, J., held that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee Investment Act, and he, therefore, made the order asked for; costs to be paid out of the estate.

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## QUEBEC.

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### In the King's Bench.

[LACOSTE, C.J., BLANCHET, HALL, WURTELE, OUMET, JJ., 20TH NOVEMBER, 1902.

REX v. FORTIER.

*Criminal law—Bail—Indictable offences—Forgery—Theft.*

The petitioner had been committed for trial on two charges of forgery and one of theft. The Judge for the

judicial district in which the offences were alleged to have been committed refused to admit him to bail. A petition was then presented to this Court.

*Held*, that the propriety of admitting to bail a person charged with indictable offences which were formerly classed as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing to take his trial, which is the object of bail, and not with reference to his supposed guilt or innocence. In determining the probability of such appearance it is proper to consider the nature of the offence charged and its punishment, the strength of the facts against the accused, his character, his means, and his standing.

In accordance with these principles it was ordered that the petitioner should be admitted to bail.

*J. A. C. Ethier*, for the petitioner.

*J. D. Leduc*, for the Crown.

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[LACOSTE, C.J., BOSSE, BLANCHET, HALL, WURTELE, JJ., 20TH  
NOVEMBER, 1902.]

### RYAN v. RYAN

*Will—Construction—Clauses creating a substitution.*

The testator, M. Ryan, bequeathed to his wife all his property "to be enjoyed by her only during her natural lifetime;" by the next clause of his will he bequeathed to his brothers and sisters all his property "to be enjoyed by them in absolute property and ownership," share and share alike, but only from and after the decease of his wife. The testator's wife survived him, and at the time of her death, Bridget Ryan was the only one of the brothers and sisters mentioned who was living, and she took possession of all the testator's estate. A nephew of the testator, a son of one of the brothers mentioned in the above clause of the will, brought this action for one-sixteenth of the estate, claiming that the will gave the widow only the usufruct, and that the brothers and sisters of the testator were bequeathed the naked ownership.

*Held*, affirming the judgment of the Court of Review, that the will created a substitution, and that Bridget Ryan, as the sole survivor of the substitutes at the death of the widow (the institute), was entitled to the whole estate.

*J. Internoscia*, for the appellant.

*M. J. Quinn*, K.C., for the respondent.

## In the Superior Court.

[TASCHEREAU, J., 15TH NOVEMBER, 1902.]

### WIGGINS v. SEMI-READY CLOTHING CO.

*Negligence—Injury to person—Bad condition of premises—Responsibility of owner to stranger.*

The plaintiff fell into the well of an elevator at the defendant's place of business and thereby injured herself. She brought action for damages alleging negligence on the part of the defendant. At the time of the accident the plaintiff was neither an employee nor a customer, but was merely a stranger upon defendant's premises.

*Held*, that the proprietor had no responsibility towards third parties who might come upon his premises without invitation or without having business to transact there.

Action dismissed.

[DAVIDSON, J., 19TH NOVEMBER, 1902.]

### RACETTE v. CARRIERE.

*Landlord and tenant—Lease—Proviso regarding subletting—Right of landlord to refuse consent to sublease.*

Action for cancellation of a lease on the ground that the defendant, in violation of one of its terms, sublet the premises without having obtained the plaintiffs' written consent. The defendant pleaded that the plaintiffs refused their consent without cause, being only ready to grant the same upon the condition that the rent should be increased; that the subtenant was solvent and was willing to pay the rent yearly in advance, or to furnish security. Against these allegations the plaintiffs inscribed in law, claiming that they were irrelevant, and that the plaintiffs had an absolute right to refuse consent.

*Held*, following *MacKenzie v. Wilson*, 10 L. N. 113, that the clause in the lease being absolute, the plaintiffs had the right to refuse consent, and that therefore, the grounds urged by the defendant did not constitute any legal justification for his conduct in subletting.

Inscription-in-law maintained and paragraphs of plea complained of struck out with costs.

*H. G. Lajoie and P. Lacoste*, for the plaintiffs.

*H. B. Rainville and Honore Gervais*, for the defendant.

[TRENHOLME, J., 24TH NOVEMBER, 1902.]

## GRANDA HERMANOS Y CA. v. GRANDA.

*Covenant—Restraint of trade—Dissolution of partnership—Agreement not to engage in competing business—Breach—Interlocutory injunction.*

A partnership existed between members of the plaintiff company and the defendant for the purpose of carrying on a general tobacco business. Upon the dissolution of this partnership the plaintiff company was incorporated, the business being transferred to it, and the former partners binding themselves not to enter in any other business or to compete with the company. Subsequently, defendant withdrew from the company, being paid in stock both for his share in the partnership, for his goodwill, and for his refraining from competing with the company. The defendant afterwards established a small business almost next door to the plaintiff company's place of business, the new business being carried in the name of his brother, J. Granda, although the latter was at that time in Spain, and knew nothing about the matter until his return. The plaintiff company applied for an interlocutory injunction restraining the defendant from buying tobacco or otherwise taking part in a business of the new concern.

*Held*, that the defendant had violated his undertaking by making purchases for J. Granda.

Interlocutory injunction granted.

*Cook v. Brisebois*, 2 Q. P. R. 162, followed.

*R. C. Smith*, K.C., and *M. Goldstein*, for the plaintiffs.

*E. Lafleur*, K.C., for the defendant.

[LAVERGNE, J., 25TH NOVEMBER, 1902.]

## SORIGNET v. HENRY.

*Partnership—Appointment of liquidator—Discretion of Court.*

Petition for the nomination of a liquidator for the St. George Wine Company, a limited partnership. By the terms of the partnership agreement, the plaintiff was to furnish his time and skill, and the defendant was to provide the capital. Each party was to draw \$20 a week salary. After doing business for five weeks, the firm got into difficulties. The

plaintiff ceased work, and brought this action for the appointment of a liquidator. He had at that time drawn out \$112.

*Held*, that the appointment of a liquidator was in the discretion of the Court; that in the present instance it would be merely imposing a useless expense upon the defendant, as the whole cost would fall on him, the plaintiff having no pecuniary interest in the business.

The petition was therefore dismissed with costs.

*C. Rodier*, for the petitioner.

*Louis Boyer*, for the respondent.

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[FORTIER, J., 28th DECEMBER, 1902.]

**MARTEL v. MILITARY INSTITUTE CLUB.**

*Club—Liability for article stolen.*

The plaintiff, who was not a member of the defendant club, went there upon the invitation of a member and put his coat in the cloak room. It was taken away during his absence in another part of the club, and he sued for its value and for money paid to detectives in attempting to recover it.

*Held*, that, as the defendants were a club, and did not fall under the provisions of the Civil Code respecting inn-keepers, keepers of boarding-houses, and hotel-keepers, under similar circumstances, they were not liable for articles brought upon their premises.

Action dismissed with costs.

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[CURRAN, J., 19th FEBRUARY, 1908.]

**HEARN v. GRAHAM.**

*Defamation—Newspaper—Misleading statement—Public interest—Damages—Costs.*

The defendant published in a newspaper a statement that the plaintiff had in the Police Court pleaded not guilty to a charge of theft and had been remanded for *enquête*. As a matter of fact, the inquiry was held later in the same day, and the plaintiff was discharged. The item stating that she had been remanded, however, did not appear in the newspaper

until the following day, and no mention was made of the fact that it had subsequently been discovered that the charge was unfounded. The defendant pleaded that the item was true and had been published without malice and in good faith and in the public interest.

*Held*, that, though the item was evidently published without malice and in good faith, yet, if it was in the public interest, it was equally so that the plaintiff's discharge should have been recorded. As there was no proof, however, of any pecuniary damage suffered by the plaintiff, judgment was given for \$10 and costs as of a Circuit Court action of the lowest class.

*J. A. Bernard*, for the plaintiff.

*R. C. Smith*, K.C., for the defendant.

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[LEMIEUX, J., 21st FEBRUARY, 1908.]

### MORRIS v. BRAULT.

*Broker—Action by stock-broker—Gaming transaction—Contract void.*

The plaintiff, a stock broker, brought an action against the defendant for a balance alleged to be due on account of certain transactions. The defendant pleaded that the alleged contract was illegal, and therefore null and void. The evidence shewed that the corn and cotton which were the subjects of the alleged contract were never delivered, and that there was no intention that they should be delivered.

*Held*, that the contract sued on was a gaming one and was therefore prohibited by law.

*Forget v. Ostigny*, [1895] A. C. 318, distinguished.

*Held*, further, that the broker, having knowledge of the nature of such contract, had no recourse against his client for moneys advanced in furtherance of such contract.

*Held*, further, that, even if the defendant had recognized his debt and offered his property to cover the same, as alleged by the plaintiff, such acknowledgment was of no effect, as the debt claimed resulted from an illegal contract.

*Held*, further, that, in any event, the responsibility of a person speculating in stocks to his broker is limited to his margin, unless he has given contrary instructions.



## IN THE CIRCUIT COURT.

[DORION, J., 19TH FEBRUARY, 1903.]

## McKEE v. CANADIAN PACIFIC R. W. CO.\*

*Master and servant—Servant leaving employment without notice—Action for wages for work actually performed—Cross-demand for damages.*

The plaintiff was engaged by the defendant company at a monthly salary. After working for 19 days in a certain month, he left without giving any notice, and subsequently brought this action for \$20 for 19 days' work actually performed. The defendant company brought a cross-action for damages resulting from the plaintiff leaving their employment without notice.

*Held*, that by leaving without notice, the plaintiff had forfeited his right to wages even for work done.

*Held*, further, that upon the proof adduced the defendants had made out their case on a cross-demand.

Action dismissed and cross-action maintained.

A. W. G. Macalister, for the plaintiff.

E. Lafleur, K.C., for the defendants.

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NOVA SCOTIA.

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## In the Supreme Court.

[FULL COURT, 21ST FEBRUARY, 1903.]

## ARCHIBALD v. ARCHIBALD.

*Husband and wife—Conveyance before marriage—Fraud on marital rights—Testamentary dispositions—Wills Act, R. S. N. S. c. 129.*

The plaintiff was engaged to be married to J. C. A. in November, 1900. The marriage took place on the 4th December, 1901. The husband died on the 26th January, 1902. The deceased at the time of the marriage treaty was worth about \$13,000, one-half of it being in real estate. In August, 1901, the deceased secretly executed a conveyance of all his real estate to the defendant, and this conveyance was not

recorded until a few days before the marriage. Late in November, 1901, the deceased also assigned his securities to the defendant. The plaintiff had no knowledge of these conveyances at the time of the marriage, and only learned definitely about them after her husband's death. She thereupon brought an action to have the instruments set aside, (1) as having been made in fraud of her marital rights, and (2) as not having complied with the provisions of the Wills Act. The action was tried by TOWNSHEND, J., who found that the transfers were made with the distinct object of preventing the plaintiff from enjoying any portion of her husband's estate after his death, and that the deceased deceitfully concealed from his intended wife before and after their marriage the fact that he had stripped himself of his property. The Judge decided, however, that the instruments were not testamentary, and that the plaintiff was not entitled under our law to that relief claimed. The plaintiff appealed.

H. A. Lovett, K.C., for the plaintiff.

Lawrence, K.C., for the defendant.

The judgment of the Court was delivered by

MEAGHER, J., who stated that conversations with the deceased were admissible, not to derogate from the transfers, but to shew the design of the deceased: *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495. The only rule was that a conveyance, privately made by a woman during a treaty of marriage, was *prima facie* fraudulent and void. See per Lord Thurlow in *Strathmore v. Bowes*, 1 Ves. 27. Bright on Husband and Wife, vol. 1, p. 357, says the converse rule does not apply because settlements are usually made to prevent dower. In Cameron on Dower, p. 267, and Scribner on Dower, vol. 1, p. 562, it is stated that the reasons given by Bright can hardly apply to countries where the formalities of English conveyancing prevail only to a limited extent and where settlements to prevent dower are rare. There is, however, no English case which decides that the wife is entitled to relief against conveyances made in fraud of her marital rights. The opinions of the English text-writers are quite emphatic against the existence of such a right. The rule is different in the United States, and the following authorities were referred to to shew that the right was recognized there: Washburn on Real Property, vol. 2, p. 539; *Swaine v. Perron*, 5 Johns. Ch. 489; *Young v. Carter*, 10 Hun 194; *Pomeroy v. Pomeroy*, 54 How. 228; *Gilson v. Hutchinson*, 120 Mass. 32; Story's Eq. Jur., s. 273; Perry on Trusts, s. 213; *Murray v. Murray*, 8 L. R. A.

95; *Flowers v. Flowers*, 18 L. R. A. 75; *Smith v. Smith*, 34 L. R. A. 49. Notwithstanding such high and persuasive, but not controlling, authority, the learned Judge felt constrained to follow the English authority. Later legislation has changed the rule laid down by Lord Thurlow as to a husband's marital rights: *Crawley on Husband and Wife*, p. 57; *May on Fraudulent Conveyances*, p. 223; *Griffith's Married Women's Property*, pp. 67-69; *Smith's Principles of Equity*, p. 430.

With respect to the other branch of the case, there is nothing on the face of the instruments to indicate that their operation was to be suspended until the grantor's death. Extrinsic evidence may be given to shew his intention: *Habergham v. Vincent*, 2 Ves. 231. There are no circumstances proved in evidence to cut down the effect of the conveyances, which in their terms took effect at once. The appeal was dismissed.

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## MANITOBA.

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### In the King's Bench.

[FULL COURT, 7TH MARCH, 1908.]

#### COCKREILL v. HARRISON.

*Evidence—Corroboration in suit for breach of promise of marriage—32 & 33 V. c. 68 (Imp.)—57 V. c. 11 (Man.)*

The plaintiff brought her action for breach of promise of marriage. The defendant denied the promise. The case was tried before a jury, and a verdict given in favour of the defendant. The plaintiff appealed. In his charge to the jury the trial Judge told them that the plaintiff could not recover unless her testimony was corroborated by some other material evidence in support of the promise alleged by her. This was objected to by the plaintiff's counsel.

The principal point raised on the appeal was whether that portion of the Judge's charge was a correct statement of the law in that respect, or whether it was a misdirection.

The statement by the trial Judge was in the terms of the Imperial statute 32 & 33 V. c. 68, s. 2, which was made the law of Manitoba when it became a part of the Dominion. But it was contended on behalf of the plaintiff that the Imperial statute was repealed, so far as Manitoba was concerned,

by the Manitoba Evidence Act, 57 V. c. 11, as there was no reference or mention of the Imperial statute in the Manitoba Act, it could not be considered repealed except by implication.

*Held*, that the appeal should be dismissed with costs. It was clear that the Legislature in passing the Manitoba Evidence Act never intended that it should operate as a repeal of all provisions respecting evidence then in force, even those in previous enactments on subjects which were not referred to or touched upon by the Act. The Manitoba Evidence Act provided for certain rules of evidence applicable to various specified cases. It did not purport to be a complete code covering all points of evidence which might be raised in courts of justice. It did not touch, or in any way refer to the principal subject dealt with in 32 & 33 V. c. 68, viz., evidence applicable to cases of breach of promise of marriage and adultery.

The question of inconsistency or repugnancy could not be invoked. The two statutes could stand together without any repugnancy or unreasonableness.

At the trial the plaintiff adduced some evidence which was said to be corroborative of her statement as to the promise of marriage. It was left to the jury and it might be inferred from the verdict that the jury did not attach much weight to it, or did not consider it sufficient material evidence of corroboration.

*H. M. Howell*, K.C., for the plaintiff.

*J. A. M. Aikins*, K.C., for the defendant.

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[FULL COURT, 7th MARCH, 1903.]

### THORN v. JAMES.

*Negligence—Proximate cause—Remoteness—Voluntary incurring of danger—Contributory negligence.*

The defendant owned a threshing machine with a portable steam engine, with which he carried on the work of threshing for farmers. The plaintiff, being the owner of a pair of horses, employed a driver and let the services of both horses and driver to the defendant for use, particularly in drawing the engine about and in drawing straw or grain. Nothing was expressly said about using them for drawing the separator, though the plaintiff expressed the opinion that they might properly be used for that purpose.

While the machinery was being used in threshing grain, sparks from the engine set fire to a stack. The separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of drawing it into a place of safety, but the fire spread so rapidly that it burned and seriously injured the plaintiff's horses before the separator could be moved, or the horses detached and got away.

The plaintiff sued in a County Court for the loss, and recovered judgment. The Judge found that the fire was caused by negligence on the part of the defendant's servants, and held that the defendant was liable, on that ground, for the injury to horses and harness.

The defendant appealed. It was contended that the horses were not attached by the orders of the defendant's foreman, but by the voluntary act of the plaintiff's servant, who thus voluntarily incurred the risk, and so contributed to the result that the plaintiff should not recover.

*Held*, that the appeal should be dismissed with costs.

There was evidence that the fire arose through the negligence of defendant's servants; and there was an absence of precautions for the protection of the stack; the defendant owed a duty towards the plaintiff to observe care, the neglect of which gave the latter a right of action for damage arising therefrom.

There was some conflict of testimony as to whether the plaintiff's driver took the horses to the machine without orders. One witness stated that the foreman first called for horses, another that the driver had taken them there and was attaching them when the call was given. They were attached with the full concurrence and under the supervision of the foreman, which would seem to be equivalent to acting under an order. Whether the driver acted under orders, or in obedience to his own impulse, the defendant was properly held liable.

*Connell v. Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147, followed.

*J. Pitblado*, for the defendant.

*C. H. Campbell*, K.C., A.-G., for the plaintiff.

## NORTH-WEST TERRITORIES

## In the Supreme Court.

[McGUIRE, C. J., JANUARY, 1908.]

## COLONIAL INVESTMENT AND LOAN CO. v. KING.

*Mortgage—Building society—Action on covenants after foreclosure—Reopening foreclosure where stock certificate cancelled—Several mortgages—Consolidation—Purchaser for value without notice.*

This action was brought against the defendant King upon the covenants in a mortgage given by him to the Canadian Mutual Loan and Investment Company on the 4th June, 1895, for \$2,600 and interest and certain charges in connection therewith. The plaintiffs claimed to be the assignees of or otherwise well entitled to the mortgage security. The defendant Lewis was added at the trial.

*Norman Mackenzie*, for the plaintiffs.

*C. T. Jones*, for the defendants.

McGUIRE, C.J.—In the statement of claim reference is made to a prior mortgage on a different parcel of land given by the defendant King to secure \$400 and interest, and it was urged that King was not entitled to pay off and receive a discharge of this prior mortgage without also paying off the \$2,600 mortgage. This question, doubtless, arose because of an effort of King to pay off this \$400 mortgage, he having sold the land covered by it to one Charles Lewis. Lewis applied during the trial for leave to come in and defend this action so far as the land covered by the \$400 mortgage is concerned, on the ground that he had bought the land prior to the giving of the \$2,600 mortgage and had paid the full sale price thereof, and was entitled to a conveyance thereof from King free from the mortgage referred to. I allowed Lewis to come in and to put in a statement of defence, which he did, and counsel appeared for him at the trial and evidence was gone into on his behalf, which satisfied me that he had under an agreement for sale in March, 1894, bought the land and paid the full consideration mentioned in the said agreement of sale. He is now entitled as against the defendant King to a transfer free from said mortgage.

The plaintiffs allege that in the \$400 mortgage there is a clause whereby King agreed that the mortgagees should have a lien upon all shares of the capital stock of the mortgagees *then held or thereafter subscribed* for by the mortgagor King, and whereby, further, he agreed to assign the shares he then held to the mortgagees forthwith, and a similar clause in the \$2,600 mortgage. There is nothing, however, in either mortgage giving the mortgagees a lien on any *land* except the lands respectively mentioned in such mortgage. The defendant Lewis was not a holder or subscriber for any stock of the mortgagees, and is not concerned in the question of how far the stock held by King mentioned in the \$400 mortgage may be subject to a lien for the payment of the \$2,600 mortgage. He bought the land with knowledge of only one mortgage thereon, viz., for \$400. The \$2,600 mortgage was not then in existence, and did not come into existence for over a year after the purchase by Lewis. It may be taken that the plaintiffs assert that he is affected by the term in the \$2,600 mortgage which they say gives them a lien, as against King, on the four shares of stock mentioned in the \$400 mortgage, but I cannot see in what way he can be affected by an agreement to which he is not a party in any way, which was not entered into by anyone till long after his purchase, and which was not made in pursuance of any covenant in the \$400 mortgage, of which alone he had any knowledge. There is, as already mentioned, a proviso in that mortgage that the mortgagees shall have a lien on any subsequent stock which King might subscribe for, but there is nothing to the effect that either the land or stock mentioned in the \$400 mortgage, shall be deemed security for the payment of any subsequent mortgage King might see fit to give to the mortgagees, and the subsequent mortgage, when looked at, does not in any way give the mortgagees a lien on any *land* but the land mentioned therein, which does not include the land bought by Lewis.

By the terms of the \$400 mortgage King was to repay the loan of \$400 with interest at 15 per cent., but by a subsequent clause it was "expressly understood and agreed" that if King paid certain monthly sums until the maturity of the four shares mentioned therein, such payment "shall be taken in full payment of the principal and interest above reserved." It is not said that on such payments and at maturity the mortgagor shall be entitled to four shares of a par value of \$400, and that he may therewith pay off the mortgage. However, as far as Lewis is concerned, any question affecting King's stock does not affect him. The mortgagor was not bound to pay as in this proviso. He might pay the \$400 with 15 per cent. interest monthly on the first Tuesday in Febru-

ary, 1901, or he might pay it off at any time after the expiration of two years from the date of the mortgage by giving 30 days' notice or paying interest for an additional 30 days. It seems to me that is Lewis's position. The outside he can be called on to pay is the \$400 and interest, less any payments made thereon by King which he may be found entitled to apply in reduction thereof.

In case the plaintiffs should claim a right to consolidate their two mortgages, it was contended by counsel for Lewis that, as against him at least, the plaintiffs have no such right, whatever their rights may be against King. The law as stated by Mr. Justice Street at the trial of *Stark v. Reid*, which will be found in a foot note to the report of that case in 26 O. R. at pp. 262-5, seems to be as contended for by counsel for Lewis. In the present case the plaintiffs had no right to consolidate when Lewis purchased, and when, some years afterwards, both mortgages were in default, they elected to "foreclose," or more correctly speaking to enforce their security under the \$2,600 mortgage alone as against the land mentioned therein only.

They did not comply with any of the conditions laid down by Mr. Justice Street as essential to the right to consolidate. I may observe, *en passant*, that the word "foreclose," as applied to proceedings to enforce a mortgage under the Land Titles Act in the Territories, is apt to mislead if it is sought to treat these proceedings as identical with "foreclosure" proceedings where the mortgage conveys the land to the mortgagee with a defeasance clause in case payments are made as provided. In such a mortgage the mortgagor has only an "equity of redemption" after the time for payment has expired without payment, that is, he is held in equity entitled to come in and redeem after default upon certain terms, but no particular time has been fixed within which he must exercise that right. In order, therefore, that the mortgagee may not be kept indefinitely in suspense he is allowed to call upon the mortgagor to exercise his right within a limited time. The amount the mortgagor must pay to redeem is ascertained by the Court. He is notified that unless he pays that amount by the day named his right to redeem will be barred, and in the event of his availing himself of this final opportunity the Court declares that his right to redeem is gone—the mortgage is foreclosed. But under our Land Titles Act the mortgage does not operate as a transfer of title but only as security. The mortgagor remains the owner of the legal estate. The mortgagee merely has a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in



himself. Upon getting a final order vesting the title in him he can obtain from the registrar of Land Titles a certificate which gives him an absolute title freed from all claim by the mortgagor. Under these circumstances one must be careful when endeavouring to apply to mortgages here the rules and principles laid down, say in England or Ontario, as governing the rights of parties to mortgages there.

To turn now to the right of the plaintiffs as against the defendant King. It appears that the mortgagees took proceedings to enforce their security under the \$2,600 mortgage as against the land mentioned therein, and, as set out in their statement of claim, "upon the 24th day of August, 1899, recovered judgment for foreclosure, foreclosing the defendant's interest in the property described in the said first mentioned mortgage, and a certificate of title shewing the said property to be vested in the mortgagees was issued on the 24th day of August, 1899, to them." A certified copy of that judgment was put in by the defendant King, from which it appears that "it is ordered that the defendant do stand absolutely debarred and foreclosed of and from all right and title, interest or estate, or right in equity of redemption of, in, or to the above described lands. And it is further ordered that all the estate and interest of said George Clift King or of any one claiming through or under him in the said lands (describing the lands in the \$2,600 mortgage), be and the same is vested in the said plaintiffs (the mortgagees) free from all right or equity of redemption on the part of the defendant King or any one claiming through or under him."

This judgment or order was registered in the proper land titles office, and a certificate of title thereupon issued vesting the title in the land in the mortgagees.

It will be noticed that, while the person who drafted the judgment has used the word "foreclosed," he has also used words apt and necessary to vest the title in the mortgagees. The ordinary judgment in a foreclosure action under a mortgage which passes the legal estate to the mortgagee is usually in this form (Seton):—"It is ordered that the defendant A. B. do from henceforth stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises." That is, the relief given by the equity courts is now taken away from him. There is nothing there as to vesting in the plaintiff the defendant's title in the land, because the mortgage has already passed the legal estate. In the Territories it was necessary to do more than bar the defendant. An order in the terms of a foreclosure order in the form taken from Seton would not have

satisfied the registrar or warranted him in issuing a certificate of title. The judgment had to vest the title to the land in the plaintiffs, and that is the material and indispensable portion of the judgment. The debarring and foreclosure paragraph is probably not at all essential, however prudent it may have been deemed to insert it.

This, then, was a judgment that the land formerly the defendant's and against which the plaintiffs merely had a lien by way of security, is now transferred from the defendant to the plaintiffs. The plaintiffs obtained that judgment by virtue of having satisfied the Judge that the value of the land was not in excess of their claim, otherwise, according to the well-known practice in such cases, had the property been of considerably greater value than the plaintiffs' claim, a sale would first have been ordered. The plaintiffs, however, put in a statutory declaration of value made by one G. Tempest, who describes himself as the plaintiffs' "agent," that the land did not exceed in value \$3,000.

It is, therefore, by their own deliberate acts that a judgment was obtained vesting the title in them instead of having the property sold. The result was the same as if the mortgagor had given them a transfer. Now, had he given them a conveyance, they could not have sued him on his covenant "in the absence of evidence to shew a contrary intent or result." (*North of Scotland Mortgage Co. v. Uddell*, 46 U. C. R. at p. 517.) On the same page the learned Chief Justice says: "I am strongly of opinion that the burden is thrown upon the plaintiff to satisfy a jury that a different effect was intended to be given to the transaction." In the present case there is no evidence to shew that the plaintiffs intended to reserve the right to sue on the covenant. There are some circumstances tending to establish the opposite, such as their intentionally electing to take a vesting order rather than an order for sale, and the fact that they waited over sixteen months after getting their vesting order before beginning the present action. In the case just referred to the plaintiffs had taken a deed in fee, but the cases relied upon by Hagarty, C.J., shew that a conveyance of the equity of redemption had the same effect. It seems to me that, if anything, the conveyance by a mortgagor in the Territories to the mortgagee of his legal estate is, when unexplained, even stronger evidence that the mortgagee did not intend to reserve a right to sue on the covenant. To use again the language of the judgment of Hagarty, C.J.: in such a case "the natural presumption must be that the charge is merged in the complete ownership of the inheritance." Now there was, it is true, no conveyance executed by King to the mortgagees, but there is

what is equivalent, a conveyance by order of the Court, and whatever reasons apply in the one case seem to me equally applicable in the other, for presuming a merger of the charge in the title thus vested in the mortgagors. It may often be a very distinct advantage to a mortgagee to get the property itself in preference to receiving his money, especially in the west here, where land values are rapidly increasing. At any rate, where he chooses to take the title without reserving his right to sue on the covenant, it seems only reasonable that the presumption should be as laid down in the case just cited. I think that a jury would reasonably find in the present case that the mortgagees did not intend to reserve a right to sue on the covenant, and that is the conclusion I have arrived at on the facts. As to merger of a claim in a judgment see *Toronto Dental Mfg. Co. v. McLaren*, 14 P. R. 89. The head note of a decision taken from a digest of Australian cases under the Torrens Land System, *Campbell v. Bank of N. S. Wales*, 16 N. S. W. L. R. 285, and 11 App. Cas. 192, was cited on the argument by counsel for the defendant King : "Where the formalities prescribed by the Real Property Act for the foreclosure of a mortgage under the Act have been complied with, and there has been no fraud, a Court has no power to reopen the foreclosure." Unfortunately, I have been unable to see the reasons given in the judgments in the case and am left to conjecture what were the grounds of the decision.

There were other defences set up which I may refer to. For example, the plaintiffs offer to reopen the foreclosure. I am not convinced that the judgment in the present case was a "foreclosure" in the sense in which the word is used where the law as to reopening a foreclosure is dealt with. It seems to me it is a judgment, and the evil of allowing the plaintiffs to reopen it would be the same as allowing a plaintiff to get a new trial in any other case in which he has proceeded to judgment and has got all he asked for. See the case cited from 14 P. R. But it is not necessary to express any decided judgment on the point. But, assuming it to be a case governed by the practice as to reopening foreclosures, the defendant urges that, while it is true a plaintiff who has foreclosed (using the word in its correct sense) may nevertheless sue on the covenant, if the property proves of less value than the amount due on the mortgage, yet he cannot do so in the absence of fraud unless he is prepared to restore the security. and the defendant says that the plaintiffs are not in a position to do so here. The security mentioned in the mortgage

consists of the land and 26 shares of stock, on which the mortgagor had made a considerable number of payments. In fact the plaintiffs contend that the stock was the principal security, the land being merely collateral to the shares. The defendant says that the mortgagees cancelled the 26 shares of stock, and I think the evidence of Mr. Mitchell has established that fact in the affirmative. See particularly his answers to questions 256-261, 262, 276, 277, 278, 284. From these answers it clearly appears that the 26 shares were "absolutely forfeited," and before the present action was commenced. His answers to questions 296-8 confirm this. These acts of forfeiture and "writing off" of these shares were done by the Canadian Mutual Loan and Investment Company, the predecessors of the present plaintiffs, and, so far as appears from the evidence, nothing has been done either by the old company or by the present plaintiffs to reinstate King as a shareholder or to revive his forfeited stock. Such being the case, it is urged that the plaintiffs are unable to deliver over to him that which they contend is the principal security mentioned in the mortgage, and which, in whatever view is taken of the mortgage, was clearly a portion of the security. The law is quite clear as claimed by the defendant that if the plaintiffs, after foreclosing, attempt to recover upon the covenant to pay, they cannot succeed unless they are in a position to deliver back the security. The law is so laid down by the Master of the Rolls in *Palmer v. Hendrie*, 27 Beav. at p. 351: "The question is whether the mortgagee has made it impossible to restore the property mortgaged. He can undoubtedly at law sue upon the covenant. . . . but the mortgagees must perform their reciprocal obligation. They are bound on payment to restore the property to the mortgagor, and if it appear . . . that by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate upon payment, this Court will interfere and prevent the mortgagee suing the mortgagor at law." That decision was where there were separate courts of law and equity in existence, but the law is the same now where the same court exercises the functions of a court of equity as well as of law. See also *Walker v. Jones*, 35 L. J. P. C. at p. 35; *Kinnaird v. Trollope*, 39 Ch. D. 636. In the view I have taken upon the other ground, it is not necessary to say anything further on this ground of defence.

On the whole, I am of opinion that the plaintiffs are not entitled to succeed in the present action, and that the action should be dismissed with costs of both defendants to be paid by the plaintiffs.

## Supreme Court of Canada.

ONTARIO.]

[17TH FEBRUARY, 1908.]

### BLACKBURN v. McCALLUM.

*Will—Devise—Restraint on alienation—Time limitation.*

A devisee of real estate under a will was restrained from selling or incumbering it for a period of twenty-five years after the testator's death.

*Held*, that, as the restraint, if general, would have been void, the limitation as to the time did not make it valid.

Judgment of a Divisional Court (on an appeal *per saltum*) reversed.

*E. D. Armour*, K.C., for the appellant.

*J. Travers Lewis*, for the respondent.

### AGRICULTURAL SAVINGS AND LOAN CO. v. LIVER- POOL AND LONDON AND GLOBE INSURANCE CO.

*Fire insurance—Void policy—Renewal—Mortgage clause.*

By s. 167 of the Ontario Insurance Act, a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy.

*Held*, reversing the judgment of the Court of Appeal, 3 O. L. R. 127, 21 Occ. N. 582, and restoring that at the trial, 32 O. R. 369, 21 Occ. N. 124, GIROUARD, J., dissenting, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval.

Per GIROUARD, J., that the renewal was a new contract, which was avoided by non-disclosure of the concealment in the application for the original policy.

The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the

property insured, &c.," applies only to acts of the mortgagor after the policy comes into operation and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy.

*Quære*: Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy?

*W. R. Riddell*, K.C., and *A. E. Hoskin*, for the appellants.

*R. Bayly*, K.C., and *A. B. Aylesworth*, K.C., for the respondents.



### FRANKEL v. GRAND TRUNK R.W. CO.

*Railway—Carriage of goods—Claim for non-delivery—Special instructions—Acceptance by consignees—Warehousemen—Negligence—Amendment.*

The plaintiffs, dealers in scrap iron at Toronto, for some time prior to and after 1897, had sold iron to a rolling mills company at Sunnyside. The defendants had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the rolling mills company had a siding capable of holding three or four cars. In 1897 the plaintiffs instructed the defendants to deliver all cars addressed to their order at Swansea or Sunnyside to the rolling mills company, and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company, and shipped to them at various times up to the 2nd January, 1900, five cars, one addressed to the company and the others to themselves, at Sunnyside. On the 10th January the company notified the plaintiffs that previous shipments had contained iron not suitable for their business and not of the kind contracted for, and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars, and the remainder before the end of January. On the 4th February the cars were placed on a siding to be out of the way and were there frozen in. On the 9th February the plaintiffs were notified that the cars were there subject to their orders, and two days later F., one of the plaintiffs, went to Swansea and met the company's manager. They could not get at the cars where they were, and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April, when the price of the iron had fallen, and the plaintiffs would not accept it, but, after considerable correspondence and negotiation, they took them

away in the following October, and brought this action against the defendants, founded on the failure to deliver up the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company, but sometimes they were sent without instructions, and on the 3rd February the station agent had written to the plaintiffs that the cars were at Swansea and would be sent down to the rolling mills.

*Held*, affirming the judgment of the Court of Appeal, 22 Occ. N. 176, that the rolling mills company were consignees of all the cars, and that they had the right to reject them at Swansea if not according to contract. Having exercised such right, the defendants were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive the iron.

The Court of Appeal, while relieving the defendants from liability as carriers, held them liable as warehousemen, and ordered a reference to ascertain the damages on that head.

*Held*, reversing such decision, MILLS, J., dissenting, that, as the action was not brought against the defendants as warehousemen, and as they could only be liable as such for gross negligence, and the question of negligence had never been raised nor tried, the action would be dismissed *in toto*, with reservation of the right of the plaintiffs to bring a further action should they see fit; and the appeal was allowed with costs.

*W. Nesbitt*, K.C., for the appellants.

*G. F. Shepley*, K.C., and *J. Baird*, for the respondents.

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NOVA SCOTIA.]

### MCDONALD v. McDONALD.

*Gift—Donatio mortis causa—Deposit receipts—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.*

McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000, which he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother, and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for \$2,000 each, payable out of the deposit receipt, to the respective beneficiaries, which McD. signed and returned to his brother, who handed to

McD.'s wife the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards.

*Held*, affirming the judgment appealed against, 35 N. S. Reps. 205, SEDGEWICK and ARMOUR, JJ., dissenting, that this was a valid *donatio mortis causa* of the deposit receipt and the sum it represented, notwithstanding that there was a small amount for interest not specified in the gift.

By R. S. N. S. 1900 c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife, or both, unless it is corroborated by other material evidence.

*Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential.

W. B. A. Ritchie, K.C., for the appellants.

B. Russell, K.C., and R. E. Harris, K.C., for the respondents.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

MACMAHON, J.]

[26TH JANUARY, 1908.]

McKAY v. GRAND TRUNK R. W. CO.

*Railway—Crossing—Speed of trains—Fences—Statutory requirements—Negligence—Injury to person crossing track—Contributory negligence—Findings of jury.*

By the Dominion Railway Act, 1888, s. 197, as amended by 55 & 56 V. c. 27, s. 6, it is provided that "at every public road crossing at rail level of the railway, the fence on both sides of the track shall be turned into the cattle guards, so as to allow of the safe passage of trains." By s. 259 of the former Act, as amended by s. 8 of the latter, it is provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act."



*Held*, that the words "in the manner prescribed by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically prescribed in the railway legislation, the meaning of s. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveler while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was travelling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere.

Judgment of MACMAHON, J., affirmed.

W. B. Riddell, K.C., for the appellants, defendants.

I. F. Hellmuth, K.C., for the plaintiff.

BRITTON, J.]

[26TH JANUARY, 1908.

### WILSON v. HOWE.

*Limitation of actions—Claim against estate of deceased person—Corroboration—Special agreement—Running account—Terms of credit—Demand—Fraud upon creditors—Pleading.*

The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901.

The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money, and to leave it in the hands of the deceased, who said he would save it for the plaintiff and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were

produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinctly, was given by another witness.

*Held*, that there was sufficient corroboration of the plaintiff's statement.

*Held*, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and, as there was no demand before the 16th May, 1895, the action was in time.

*Held*, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it: *Day v. Day*, 17 A. R. 157.

Judgment of BRITTON, J., reversed.

*J. P. Mabee*, K.C., for the appellant, the plaintiff.

*J. Idington*, K.C., for the defendants.

## ✓ HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., BRITTON J., 6TH MARCH, 1903.]

### LAWRENCE v. TOWN OF OWEN SOUND.

*Municipal corporation—Construction of ditch without by-law—Trespass—Negligence—Costs.*

Section 470 of the Municipal Act, R. S. O. 1897 c. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality."

In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—

*Held*, that s. 470 did not apply, as the plaintiff's claim was for trespass, and not for negligence; and that the trial Judge had power over the costs; and the Court would not

interfere with his decision in awarding costs up to the trial to the plaintiff, while directing a reference as to damages.

Judgment of FERGUSON, J., 1 O. W. R. 559, affirmed.

*G. F. Shepley*, K.C., for the appellants.

*J. H. Moss*, for the plaintiff.

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## NOVA SCOTIA.

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### In the Supreme Court.

[TOWNSHEND, J., 15TH NOVEMBER, 1897]

TOWN OF AMHERST v. READ.

TOWN OF AMHERST v. FILLMORE

*Municipal corporations—Powers of council—Voting money to Councillors for services—Action against councillors to recover back—Interest—Costs.*

Actions tried together without a jury. The facts are stated in the judgment.

*Townshend*, Q.C., for the plaintiffs.

*Dickey*, Q.C., for the defendants.

TOWNSHEND, J.—The defendants were both elected and returned as councillors for the town of Amherst, and, while serving in that capacity, at a meeting of the council they both voted for the following resolution:

“Moved by Councillor Read (the defendant) and seconded by Councillor Fillmore (the defendant) that the mayor and councillors receive a salary of \$100 each for 1891 to date from 1st February, 1891.”

This resolution passed, and the defendants respectively drew the money from the town treasury. This remained unobjected to until the present year, when the council passed a resolution calling on the defendants to refund the money as illegally and improperly voted and taken. The defendants refusing to comply, this action has been brought to compel its repayment. The defendant Read, and I assume the defendant Fillmore, proved that he had performed very great and meritorious services in settling the affairs of the newly-incorporated town, which, in my opinion, were poorly compensated for by the small sum they respectively received, and he had also been re-elected to the council after the fact had

been known and discussed that he had taken this money. However strongly these facts go to his credit, they are entirely beside the question raised in this action, that is to say, the legal right of a municipal council to vote money not authorized by statute.

The powers of assessment of town councils are defined and limited by s. 68, c. 1, Acts of 1888, and s. 81 defines the objects for which the assessments are to be made. Among other powers specially and carefully defined is "the payment of salaries and compensation to the officers and servants of the town." It will not be pretended that a councillor is an officer or servant of the town referred to by this section, and the clear expression of who are to be paid salaries or compensations, to my mind, excludes every other class.

Section 81, specifying the objects to be provided for, reiterates the language of the former section, using the words "the salaries and compensation to the officers of the town." The County Incorporation Act was referred to as *in pari materia* and emphasizing the law that no salaries can be voted to councillors unless expressly provided.

In that statute there is express power for payment, at a fixed rate, of the warden and councillors, and I think it is a good illustration of the necessity for express legislation to authorize a vote for such purposes.

One cannot shut his eyes to the strong reasons for debarring a body corporate for municipal purposes from voting money to themselves or in any way being interested in municipal contracts.

Practical experience has proved it to be a source of corruption and weakness. Public policy is against it. If the councillors could vote themselves \$100, they might with equal right vote \$1,000, or even more, and the citizens would be without remedy. The authorities are numerous and consistent on this subject, and it will, therefore, be unnecessary for me to go through them with any detail. I may, however, cite a short extract from the judgment of Burns, J., in *Municipality of East Nissouri v. Horseman*, 16 U. C. R. at p. 388:

"The members or councillors composing the council are not the corporation; they are agents of the corporation for the management of the affairs and funds of the corporation. When these agents have been proved so to misappropriate the funds of the corporation as to put money into their own pockets, I think an action will lie against them to recover it back."

I do not mean by this to intimate that there was anything approaching to wilful misappropriation of the funds of

the town by Messrs. Read and Fillmore. On the contrary, so far as the matters came before me, they thought themselves fairly and legally entitled to the same as received for their extra services, but, unfortunately for them, the law, in the soundest policy, does not permit the council to regard themselves as evidently they wished to do.

The question as to the allowance of interest as well as costs against defendants was discussed before me.

I think this is a case in which interest should not be allowed until at least the town council took action in the matter on the 20th March last. The fact that they had received the money was publicly known to the council for years, and, if that body chose to lie back and do nothing, there is no sound reason why the defendants should now be called upon to pay interest until after demand made.

On the other hand, I can find no ground for depriving the plaintiffs of their costs, although, under the circumstances of the case, I should think there would be ample ground for that body to relieve the defendants from paying any costs other than their own.

Judgment for the plaintiffs in both cases with costs.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 1ST NOVEMBER, 1902.]

BELCHER v. McDONALD.

*Yukon appeal—Extension of time for appeal by Full Court—Jurisdiction—Practice—Pleadings—Amendment at trial to conform to evidence—Judgment, final in part and interlocutory in part—Appeal from—Duty of party taking out order or judgment to make it clear—Promissory note—Reference—Accounts.*

Appeal from the judgment of DUGAS, J., in the Territorial Court of the Yukon.

By the Yukon Territory Act (62 & 63 V. c. 11), the Supreme Court of British Columbia sitting together as a full Court is constituted a Court of appeal from final judgments of the Territorial Court, a notice of appeal shall be given within twenty days after judgment. From interlocutory orders or judgments there is no appeal.

*Held*, by the Supreme Court of British Columbia, sitting as a full Court, that it has no jurisdiction to extend the time for appealing.

In an action on an alleged promissory note in the Territorial Court of the Yukon, the plaintiffs' counsel, at the close of his case, asked leave to amend the claim by inserting counts on an account stated, and leave was refused. The trial proceeded, and the claim on the note was dismissed, and a reference was ordered for the purpose of taking accounts, and an order to that effect was taken out on the 30th May, without specifying the date from which the accounts were to be taken. On taking the accounts, the referee, at the direction of the Judge, as to which it did not appear that the plaintiffs had notice, took the accounts as beginning at a date unsatisfactory to the plaintiffs, and the referee's report was confirmed by the Judge.

*Held*, on appeal, that, as the plaintiffs should have been allowed to amend their pleadings, although the order of the 23rd May was final as far as the claim on the note was concerned, and an appeal from it had not been brought in time, yet, as an amendment had been improperly refused, and the Judge, in giving his judgment of the 23rd May, had not made it clear to the plaintiffs what his judgment really decided, the case should be examined on the merits.

*Held*, on the merits, that the judgment of DUGAS, J., must be affirmed.

*Per* HUNTER, C.J., and DRAKE, J.:—In an action embracing several causes of action there may be a judgment or order which is final as to one cause of action and interlocutory as to others, and a party dissatisfied with the part which is final must appeal within the time limited for appealing from final orders, and cannot question its correctness in an appeal from the judgment at the conclusion of the whole action.

*Per* HUNTER, C.J.:—(1) It is incumbent on a successful party to take care that an order or judgment in his favour is drawn up in clear and unmistakable language, otherwise the benefit of any doubt as to its scope which cannot be resolved by reference to any prior or contemporaneous record or other competent document, should be given to the party aggrieved.

(2) A man is not bound to say yes or no at once when confronted with a demand for the payment of money about which there may be doubt as to his liability to pay, but he is entitled to a reasonable time according to the circumstances

of the case, to consider the position and to make up his mind whether he really owes the money or not, and as to what course he will take.

Sir *C. H. Tupper*, K.C., and *F. Peters*, K.C., for the appellants.

*E. P. Davis*, K.C., and *A. Noel* (of the Yukon Bar), for the respondents.

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## NORTH-WEST TERRITORIES

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### In the Supreme Court.

#### IN CHAMBERS.

[RICHARDSON, J., 9TH MARCH, 1903.]

#### *In re* CASTLE AND BENOIT.

*Criminal law — Summary conviction — Manitoba Grain Act — Offences against — Station agent — Allotting cars to shippers.*

T. O. Partridge, a justice of the peace in and for the North-West Territories, under the provisions of s. 900 of the Criminal Code, on the application of A. V. Benoit, a station agent of the Canadian Pacific Railway Company, who, on the 6th December, 1902, on the prosecution of Charles C. Castle, was convicted before the said justice of violating the provisions of the Manitoba Grain Act and amendments thereto, and who, alleging he was aggrieved by such conviction, desired to have the question of its validity on the ground that it was erroneous in point of law, submitted to a Judge of the Supreme Court of the North-West Territories by means of a case stated and signed under the provisions of s. 900 of the Criminal Code, stated and signed a case in which, after reciting the proceedings had before him in the matter, he submitted to a Judge for hearing and determination the seven questions referred to in the judgment.

The case was heard before RICHARDSON, J., in Chambers, at Regina, on the 19th February, 1902.

*J. A. M. Aikins*, K.C., and *Norman Mackenzie*, for Benoit, the appellant.

*H. M. Howell*, K.C., and *T. C. Johnstone*, for Castle, the prosecutor and respondent.

RICHARDSON, J.—Questions 1, 2, and 3, argued together, are as follows:—

“1. Assuming that a farmer desires to load direct from his waggon into a car at a station, where there is a loading platform, and has made an order for such car to be placed at the loading platform and out of the batch of cars next arriving, and one car has been allotted to said farmer for such purpose, but, by reason of there being other cars of prior applicants at the loading platform and to be loaded at such platform, the car allotted to said farmer can not be accommodated or placed thereat, whereupon he applies to the station agent to be permitted to load the car direct from the waggon to the car at a point on the siding other than where the loading platform was:—

Is it a violation of the said Grain Act for the agent to refuse such permission?

2. Is the station agent obliged to permit such loading?

3. Assuming that, by reason of other cars being loaded at the loading platform and to be loaded at such platform in priority to the car allotted to such farmer, such last mentioned car could not be placed at the loading platform within 24 hours after it was so allotted to the said farmer:—

(a) Is it a violation of the Grain Act for the station agent to refuse to hold the car for said farmer longer than 24 hours after it was so allotted?

(b) Is the station agent bound to hold the car even for the 24 hours for the farmer, when he knows that by reason of preceding cars to be loaded at the said platform, the said car cannot be loaded within 24 hours?”

After giving the subject matter of these my best consideration, I am unable to hold that the Act clearly provides for the points raised in these three questions, and, as the conviction, in my judgment, is sustainable upon others of the questions submitted, it becomes unnecessary and I decline to make any decided answer to these questions 1, 2, and 3.

Question 4 is as follows:—

“4. Assuming that a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and that he has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets:—

Is it a violation of the said Grain Act and amendments for the station agent to refuse to recognize such farmer as



an applicant and to recognize his order in the order book for a car or cars to ship out the said grain?"

Mr. Howell admitted that, as the operator of an elevator is the only person who controls its working as to receiving in and passing out grain, he is the only person capable of making order for cars for shipment of grain in the elevator.

I hold that the station agent, by refusing the farmer's application as stated, did not contravene the law created by the Act.

Question No. 5 is as follows:—

"5. Assuming that a farmer has made order for cars in the order book at the station, and that all applicants for cars who had made order prior to his order in such book had each obtained one car, but not sufficient cars to fill the orders of each of the prior applicants, while the said farmer had not yet been allotted a car by reason of the shortage, and that the agent out of the next cars which arrived refused to award him a car, as there were a sufficient number of prior applicants whose orders had not been entirely filled, and that he consequently awarded of the said cars one to each of those who had ordered before the said farmer, but each of whom had already received one car:—

Was the action of the agent a violation of the provisions of the Grain Act and amendments?"

This presents, as Mr. Aikins stated, on the argument, a conundrum. He endeavoured to convince me that the station agent in refusing to allot a car to the farmer, and preferring the elevator as stated, was not transgressing the law, although the effect of such action might result in barring the farmer entirely from having a car allotted to him; while, on the other hand, the effect of Mr. Howell's contention would bar out the elevators entirely.

While entertaining great doubts, I am inclined to agree with Mr. Howell's construction of s. 58 as the only one it can have, and answer this affirmatively.

Question 6 is as follows:—

"6. Assuming that each of the prior applicants as above mentioned had been supplied with one car at the time when the said farmer gave his order as aforesaid, but on the day previous to the application of the farmer, there had been a surplus of cars after each prior applicant had been given one, and the agent in the distribution of said surplus had begun with the first applicant and distributed said cars as far as they would go, giving two or three to each of prior applicants,

but the orders of the said prior applicants still remained unfilled; that on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the said farmer, but allotted a car to each of the prior applicants, thus exhausting the said supply:—

Did the agent by doing so make a breach of the provisions of the said Grain Act and amendments?"

I fail from the argument and reading of the Act to be convinced that the course adopted by the station agent formed a breach of any of the provisions, and answer this question in the negative.

Question 7 is as follows:—

"7. Assuming that a farmer residing near Sintaluta, who had grain to ship on the 20th October, made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded; that the agent allotted a car each to the elevator companies having elevators at the said point, but whose orders were subsequent to those of the said farmer:—

Would this necessarily be a violation of the Grain Act?

The action of the station agent as set out in this question was, in my judgment, a clear violation of the Act.

As a result, my judgment is that the conviction appealed from must be affirmed.

## Supreme Court of Canada.

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QUEBEC.]

[19TH FEBRUARY, 1908.

### DONOHUE v. DONOHUE.

*Appeal—Jurisdiction—Matter in controversy—Removal of executors—Acquiescence in judgment—Right of appeal—R.S.C. c. 135, s. 29.*

The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors, though, by the action, an account for over \$2,000 had been demanded and refused by the judgment at the trial, against which the plaintiff had not appealed.

*Noel v. Chevretils*, 30 S. C. R. 327, followed.

*Laberge v. Equitable Life Assurance Society of the United States*, 24 S. C. R. 59, distinguished.

Appeal quashed with costs.

*N. A. Belcourt*, K.C., for the respondent.

*Falconer*, for the appellant.

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[23RD FEBRUARY AND 10TH MARCH, 1908.

### *In re* ST. JAMES DOMINION ELECTION.

#### BRUNET v. BERGERON.

*Parliamentary elections—Controverted election petition—Stay of proceedings pending appeal on preliminary objections—Trial within six months—Extension of time—Disqualification.*

Preliminary objections to an election petition filed on the 22nd February, 1902, were dismissed by LORANGER, J., on 24th April, and an appeal was taken to the Supreme Court of Canada. On the 31st May LORANGER, J., ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court should be given, and the same was given, dismissing the appeal, on the 10th October, making the 17th November the day

fixed for the trial under the order of the 31st May. On the 14th November a motion was made before LAVERGNE, J., on behalf of the member elect, to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on the 17th November, but the Judge held that the trial could not proceed on that day, as the order for adjournment had not fixed a certain time and place, and, on motion by the petitioner, ordered that it be commenced on the 4th December. The trial was begun on that day, and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial Judges was renewed.

*Held*, that the effect of the order of the 31st May was to fix the 17th November as the date of commencement of the trial; that the time between the 31st May and the 10th October, when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun; and that the 4th December, on which it was begun, was therefore within the six months.

*Held*, also, that, if the order of the 31st May could not be considered as fixing a day for the trial, it operated as a stay of proceedings, and the order of the 17th November was proper.

As to the disqualification of the member elect by the judgment appealed from, the members of the Court were equally divided, and the judgment stood affirmed.

A. B. Aylesworth, K.C., N. A. Belcourt, K.C., and Roy, K.C., for the appellant.

Bisaillon, K.C., and Bastien, K.C., for the respondent.

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[26TH MARCH, 1908.]

### DREW v. THE KING.

*Criminal law—Perjury—Judicial proceeding—De facto tribunal—Jurisdiction—Construction of statute.*

An information under R. S. Q., Art. 5551, for trespass upon lands in the county of Huntingdon, in the district of Beauharnois, was laid, heard, and decided before the recorder of Valleyfield, an *ex officio* justice of the peace within the whole district, but who did not reside in the county where the offence was charged to have been committed, and was,

therefore, without jurisdiction to hear the case, as R. S. Q., Art. 5561, provides that such offences shall be cognizable only by a justice or justices resident within the county where the offence has been committed.

*Held*, affirming the judgment appealed from, Q. R. 11 K. B. 477, TASCHEREAU, C.J., and MILLS, J., dissenting, that the hearing of said charge by the recorder, acting as a justice of the peace having power to hear it, was a judicial proceeding within the meaning of s. 145 of the Criminal Code, and that the appellant was rightly convicted of perjury committed by him upon such hearing, notwithstanding that the recorder had no jurisdiction over the subject matter of the complaint.

*Wilson*, for the appellant.

*Duncan McCormick*, K.C., for the Crown.

NOVA SCOTIA.]

[26TH MARCH, 1908.]

### GREEN v. MILLER.

*Libel—Privilege—Proof of malice—Admissibility of evidence—Misdirection—New trial.*

G., local manager for Nova Scotia of the Confederation Life Association, of which M. had been a local agent, wrote to Mrs. Freeman, a policy-holder, the following letter:

"I think you know that at the time of my recent visit to Bridgetown I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you, without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary, that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which up to the present time we have been unable to get him to report, and I am told that he is doing and saying all he can against myself and the company. The receipt for your premium fell due on the 30th May, days of grace 30th June. If you have made settlement

of the premium with Mr. Miller, your policy will, of course, be maintained in force, and we shall look to him for the returns in due course; but I have thought that it would be part of the plan Mr. Miller at one time declared he would follow in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so, I am prompted to write you this letter, and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy?"

In an action by M. for libel it was shewn that he had not been dismissed from the agency, but wanted larger commissions in continuing, which were refused, and that he was not a defaulter, but was dilatory in making his returns. On the trial Mrs. Freeman gave evidence, subject to objection, of her understanding of the letter as imputing to M. a wrongful retention of money.

*Held*, that such evidence was improperly received and there was a miscarriage of justice by its admission.

The Judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismiss the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true, it is malicious, and his protection is taken away."

*Held*, that this was misdirection; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true; and that it was misdirection on a vital point.

The majority of the Court were of opinion, GIROUARD and DAVIES, JJ., contra, that, as defendant had asked for a new trial only in the Court below, this Court could not order judgment to be entered for him; and a new trial was granted.

Judgment of the Supreme Court of Nova Scotia, 35 N. S. Repts. 117, reversed.

*W. B. A. Ritchie*, K.C., for the appellant.

*Roscoe*, K.C., for the respondent.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

LOUNT, J.]

[26TH JANUARY, 1908.

*In re* CITY OF KINGSTON AND KINGSTON LIGHT,  
HEAT, AND POWER CO.

*Company—Sale of gas works to municipality—Arbitration as to price—  
Franchise—Ten per cent. addition.*

By 54 V. c. 107 (O.) the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option:—

*Held*, affirming the decision of LOUNT, J., 3 O. L. R. 637, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company; and in refusing to add ten per cent. to the price as upon an expropriation under R. S. O. 1887 c. 164, s. 99.

*R. T. Walkem*, K.C., and *J. L. Whiting*, K.C., for the company, the appellants.

*D. M. McIntyre*, for the city corporation.

## HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., 19TH JANUARY, 1908]

LUDLOW v. BATSON.

*Defamation—Special damage—What constitutes.*

The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used.

Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece, from her father's estate, had put in an account for trifling matters, such as for candies, oranges, etc., the special damage alleged being that in consequence thereof the niece and wife had left him and refused to live with him:—

*Held*, that such damage was not such as was recognizable at law, not being the natural and reasonable consequence of the words used.

*W. S. Brewster*, K.C., for the plaintiff.

*J. Harley*, K.C., for the defendant.

✓ [MEREDITH, C.J., MACMAHON, J., 16TH FEBRUARY, 1908.

ONTARIO ELECTRIC LIGHT AND POWER CO. v.  
BAXTER AND GALLOWAY CO.

*Contract—Supply of electric power—Continued existence of property—Condition precedent.*

Where, under the terms of an agreement, the plaintiffs were to supply the defendants with electric current to a specified amount of horse power, to be used by them for operating their machinery, and for use in their business, and for no other purpose, the limitation was held to be for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, so that the fact of such mill being afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power.

*Taylor v. Caldwell*, 3 B. & S. 826, distinguished.

*G. Lynch Staunton*, K.C., for the plaintiffs.

*J. V. Teetzel*, K.C., for the defendants.

✓ [MEREDITH, C.J., MACLAREN, J.A., 3RD MARCH, 1908  
METALLIC ROOFING CO. OF CANADA v. LOCAL UNION  
NO. 80, AMALGAMATED SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION.

*Writ of summons—Service—Foreign unincorporated voluntary association—Parties—Incapacity—Proper time to raise question.*

The right to maintain an action or the liability to be sued can only be by or against persons as individuals, or as a cor-



poration, or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents.

A local union of workmen, a purely voluntary association, occupying none of such capacities, are not liable to be sued; and a writ served upon them was therefore set aside.

*Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 429, distinguished.

Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside the service of the writ on a motion made therefor, than to allow the case to proceed to trial with a certainty of its ultimate dismissal.

*J. G. O'Donoghue*, for the defendants.

*W. N. Tilley*, for the plaintiffs.

[STREET, J., BRITTON, J., 21ST MARCH, 1903.]

### SHUTTLEWORTH v. MCGILLIVRAY.

*Husband and wife—Gift from husband—Change of possession—Execution creditor—Seizure in conjugal domicile.*

Interpleader issue. The defendant purchased certain pictures, and, bringing them home, handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother; and all three were hung up in the house occupied by her and her husband. Some six or seven years afterwards an execution creditor of the defendant caused the sheriff to levy on these pictures.

*Held*, that since the Married Woman's Property Act, 1884, R. S. O. 1897 c. 163, s. 3, a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and in this case the subsequent possession of the pictures was the wife's, although the house was occupied by her husband and herself.

*Held*, also, that the effect of s.-s. 4 of s. 5 of R. S. O. 1897 c. 163, whereby it is enacted that a married woman married since 4th March, 1889, may hold her property free from the debts or control of her husband, "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable

to the husband's debts. This sub-section must be read in connection with s. 3, s.-s. 1, and a wife is placed precisely in the position of a feme sole with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such purpose here.

*John R. Meredith*, for the claimant.

*J. H. Moss*, for the execution creditor.

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✓ MATTHEWS v. MARSH.

*Promissory note—Accommodation maker—Renewal note obtained by fraud of principal maker—Right to sue on original note—Division Court—Power to amend.*

On the 4th April, 1899, the defendant joined with one McDonald in making a promissory note for \$130, in favour of the plaintiffs, for the accommodation of McDonald. When it became due, McDonald brought a renewal note, purporting to be signed by the defendant, which the plaintiffs accepted, and gave up the original note stamped "paid." McDonald becoming insolvent, and the plaintiffs failing to get payment of the renewal note out of his estate, they sued the defendant upon it, in a Division Court, where there was a trial by jury. The defendant swore he never signed the renewal note, but, nevertheless, there was a verdict for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge at the trial allowed the plaintiffs to claim in the alternative upon the original note, as well as claiming upon the renewal note, and to amend their claim accordingly. The jury then returned a verdict for the plaintiffs on the original note. The defendant applied for a new trial, which was refused, and he then appealed to this Court.

*Held*, that the Division Court Judge had jurisdiction to amend the plaintiffs' claim as he had done, under Rule 4 of the Division Courts.

*Held*, also, that the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by McDonald's fraud to give him up the original note, the plaintiffs retained a right to recover in equity on the original note.

*C. E. Hewson*, K.C., for the plaintiffs.

*R. D. Gunn*, K.C., for the defendant.

[BOYD, C., 25th MARCH, 1908.]

✓  
**BURKHOLDER v. GRAND TRUNK R.W. CO.***Damages—Death by accident—Apportionment between widow and children  
—Other provision for widow.*

An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three, and one year, to recover damages for the death of her husband through the company's alleged negligence, was settled by the company paying \$4,800. On application to a Judge, the amount was apportioned by giving the widow \$1,200, and each of the children \$900, the widow also to be paid for the children's maintenance \$200 a year half-yearly for three years, the fact of the widow having already received \$1,000 for insurance on the husband's life being taken into consideration.

*W. W. Osborne*, for the widow.

*D. L. McCarthy*, for the defendants.

*F. W. Harcourt*, for the infants.

✓  
[MEREDITH, C.J., 16th JANUARY, 1908.]**LONDON LIFE INS. CO. v. MOLSONS BANK.***Bills and notes—Cheques—Forged indorsements—Fraud of agent of insurance company—Payment by bank—Right of company to recover amounts paid.*

N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications sent in by him to the head office were, with the exception of some five, on the lives of fictitious persons, and, as to these five, the insurances had subsequently lapsed, of which fact the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the fictitious claimants and forging their alleged signatures thereto, whereupon cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt thereof, to see the payees and procure discharges from them. On receipt of these cheques the indorsements of the

fictitious payees' names were forged, and the cheques presented to the bank and paid in good faith, the amounts thereof being charged to the company's account.

*Held*, that the company were affected by what had been done by N. so as to preclude them from disputing the right of the bank to pay the cheques and charge the plaintiffs with the amounts thereof.

*A. B. Aylesworth*, K.C., and *E. Jeffery*, for the plaintiffs.

*I. F. Hellmuth*, K.C., and *C. H. Ivey*, for the defendants.

### IN CHAMBERS.

[MEREDITH, J., 28RD JANUARY. 1908.]

*In re WILLIAMS.*

*Will—Construction—“All my children”—Children of predeceased child.*

The testator by his will directed that after the death of his wife his estate should “be divided amongst all my children.” One daughter died, leaving issue, before the execution of the will.

*Held*, that the daughter's children did not take directly under the will, nor by virtue of s. 36 of the Wills Act of Ontario, there having been no gift to their parent.

*D'Arcy Tate*, for the executor and the children of the testator.

*T. Hobson*, for the adult grandchildren.

*F. W. Harcourt*, for the infant grandchild.

[THE MASTER IN CHAMBERS, 18TH FEBRUARY, 1908.]

LIDDIARD v. TORONTO R. W. CO.

*Parties—Joinder of plaintiffs—Distinct cause of action—Injuries received in same collision—Adding plaintiff.*

Rule 206 is to be read in connection with Rule 185, and parties to an action who might have been joined under the latter may be added by way of amendment under the former.

In an action against a street railway company for damages for running an electric car into the plaintiff and his horse and wagon in which his son was seated with him, who was also injured, the son was added as a party plaintiff in an action already commenced by the father alone.

*J. E. Cooke*, for the plaintiff.

*J. W. Bain*, for the defendants.

## NEW BRUNSWICK.

## In the Supreme Court.

## IN EQUITY.

[BARKER, J., 16TH DECEMBER, 1902.]

WOOD v. LEBLANC.

*Injunction—Cutting timber on disputed land—Finding of jury in replevin action.*

An *ex parte* injunction to restrain the defendants from cutting timber and removing timber already cut, on lands, the title to which was claimed by the plaintiff and defendants by possession, was dissolved, where a jury in an action of replevin by the plaintiff to recover timber cut by the defendants on the land, had found in their favour, though a motion for a new trial was undisposed of.

*W. Pugsley, A.-G., and Friel, for the defendants.*

*M. G. Teed, K.C., for the plaintiff.*

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[20TH JANUARY, 1903.]

HALE v. PEOPLE'S BANK OF HALIFAX.

*Partnership—Dissolution—Power of parties to complete contracts previously made.*

Notwithstanding the dissolution of a partnership, a partner continues, until a receiver is appointed, to have the same power that he had before the dissolution to complete contracts previously made, for the purpose of winding up the partnership affairs.

*W. Pugsley, A.-G., and G. W. Allen, K.C., for the plaintiffs.*

*Currey, K.C., Grimmer, K.C., and Carvell, for the defendants.*

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STEWART v. FREEMAN.

*Tender—Bank notes.*

A tender in bank notes is good, though the notes are not legal tender, if the tender is not objected to on that account.

*D. McL. Vince and J. C. Hartley, for the plaintiff.*

*A. B. Connell, K.C., for the defendant.*

[17TH FEBRUARY, 1903.]

## KERRISON v. KAY.

*Will—Construction—Date of vesting.*

By his will the testator gave to his wife a life interest in all his property, and upon her death he bequeathed to an adopted daughter K. a sum of money to be invested in the name of A., her son, on any more issue of hers there might be; the interest to be hers for life; and in case of her death or her said son "leaving more issue, the remainder to be equally divided among them; and in case of her death, and her said son leaving no other issue, then the (said) sum to revert back to C." On the death of K. she was survived by her said son A. and two other children.

*Held*, that the fund vested absolutely on the death of K. in her three children, and that it was not the meaning of the will that the fund vested in C. in event of A. dying, leaving no brother or sister surviving him.

*A. I. Trueman*, K.C., for the plaintiffs.

*C. N. Skinner*, K.C., for the defendants.

[17TH MARCH, 1903.]

## CUSHING SULPHIDE CO. v. CUSHING.

*Discovery—Production of documents—Affidavit—Order.*

Where inspection is sought of documents supposed to be in the possession of the opposite party, an order should be obtained under s. 59 of 53 V. c. 4, for discovery by affidavit as to what documents are in the opposite party's possession, when an order may be made under s. 61 for their production.

*A. P. Barnhill*, for the application.

*A. H. Harrington*, K.C., contra.

## In the St. John County Court.

## IN CHAMBERS.

[FORBES, Co. J., 3RD APRIL, 1903.]

## BELYEA v. HATFIELD.

*Pleading—County Court—Action against administrator.*

Where the defendant, being sued in the County Court as an administrator, pleaded that the intestate was never indebted, and for a second plea, *plene administrant*, the Court

ordered the second plea to be struck out, on the ground that more than one plea can only be pleaded by leave of the Court.

*G. H. V. Belyea*, the plaintiff, in person.

*J. J. Porter*, for the defendant.

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## MANITOBA.

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### In the King's Bench.

[FULL COURT, 14TH MARCH, 1908.]

RURAL MUNICIPALITY OF NORTH CYPRESS v. CAN-  
ADIAN PACIFIC R. W. CO.

RURAL MUNICIPALITY OF ARGYLE v. CANADIAN  
PACIFIC R. W. CO.

SCHOOL DISTRICT OF SPRINGDALE v. CANADIAN  
PACIFIC R. W. CO.

*Assessment and taxes—Railway lands—Exemption—"For 20 years after grant thereof from the Crown."—Commencement of term—Powers of School districts in Territories.*

Appeals from judgments dismissing three actions for the recovery of taxes upon lands. The actions and appeals were consolidated and dealt with together.

The first two actions were brought by rural municipalities in Manitoba. In the third the plaintiffs were a school corporation in the North-West Territories. The company defended without objection, and submitted to the jurisdiction of the Court in the latter case. The suits were instituted for the purpose of settling the liability of the company's lands to taxation by corporations of the characters of the respective plaintiffs. It was admitted that the company were liable, unless the lands were exempt from assessment and taxation under the contracts for the construction of the railway, made between the promoters of the company and Government of Canada and the legislation relating thereto.

North Cypress and Argyle were municipalities in the portion of Manitoba added to the Province under the Dominion Act 44 V. c. 14, assented to by the Legislature of Manitoba by 44 V. (3) c. 1.

The lands for taxes on which North Cypress sued were two of the sections lying within the belt of 48 miles in width (24 miles on each side of the railway) from which the land

subsidy of the company was, in the first place, to be granted under par. 11 of the contract.

The land in respect of which Argyle sued was not in that belt, but in one to the south of it, first set aside for the purposes of the contract by order in council of the 2nd November, 1882.

The land in respect of which Springdale sued was in the North-West Territories in the belt of 48 miles referred to in the 11th par. of the contract.

The contract for the construction of the railway was dated the 21st October, 1880, and was "approved and ratified" by Dominion Act of the 15th February, 1881; the Government gave to the company a subsidy in money and land.

Under s. 16, the stations, station grounds, capital stock, etc., were to be "forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any municipal corporation therein; and the lands of the company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown."

Shortly after granting the charter, the Parliament of Canada by 44 V. c. 14, enlarged the Province of Manitoba by the addition of territory which had been part of the North-West Territories. The enlargement was on certain terms, one of which was thus expressed: "The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof." By 44 V. (3) c. 1, the Legislature of Manitoba expressed its consent to the enlargement and to the conditions thereof.

*Held*, that the exemption clause was part of a contract between the Government of Canada and the promoters of the company, and it must be construed upon the ordinary principles of the interpretation of contracts. The exemption was to be one portion of the consideration for a work and service which the Government wished to obtain.

The "grant thereof from the Crown" referred to in the exemption clause was to be a formal grant by conveyance of the lands in the usual course. It appeared absolutely clear that the twenty years of exemption were to run from the time when the company should acquire a full and complete title, legal and equitable, such as would entitle them absolutely to deal with the land and as they could force upon a purchaser.

The period of exemption could not commence at the time of the contract, because the contract itself, par. 11, speaks of the lands as the grant of land *hereby agreed to be made* and not as hereby made. After the defendants had constructed a portion of the line, they had earned a proportionate part of



the land grant; they were entitled to receive certain lands but not any particular lands; that by itself did not constitute a grant from the Crown. There was something further to be done, to select the lands and signify their acceptance to the Government. Until formally conveyed the legal title remained in the Crown.

As to the Springdale school district case:—

*Held*, DUBUC, J., dissenting, that when the contract was made, the Territories had power to establish the system of local taxation for the support of schools under which the claim of this district arose; that the contract with the promoters of the company was not intended to bind the Dominion to restrict that power either with reference to property then owned by any person or corporation, or with reference to property to be thereafter acquired from the Crown or others; and that the ratifying Act and the subsequent legislation did not restrict it. The school district was not affected by exemption, and was entitled to recover.

*Per* DUBUC, J.—The lands in the Springdale case, as in the two others, did not become the defendants' lands and were not taxable until the title thereof passed to them by a formal grant, *i.e.*, by letters patent, and no particular parcel was taxable until after twenty years from the issue of patent therefor.

Appeal of Manitoba municipalities dismissed.

Appeal of Springdale school district allowed and judgment entered for the amount claimed with costs of the action. No costs of any of the appeals.

*Canadian Pacific R. W. Co. v. Cornwallis*, 7 Man. L. R. 1, 19 S. C. R. 702, followed.

*H. M. Howell*, K.C., and *T. G. Mathers*, for the plaintiffs.

*J. S. Ewart*, K.C., *J. Stewart Tupper*, K.C., and *F. H. Phippen*, for the defendants.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 26TH JANUARY, 1903.]

BEATON v. SJOLANDER.

*County Court—Territorial jurisdiction—Judgment by default—Application to set aside and for leave to defend—Waiver.*

In the plaint in an action in the County Court of Yale it appeared that the defendants resided in Vancouver, out-

side the county of Yale, and the plaintiff's claim was described as being "against the defendants as makers of a promissory note for \$179.12 dated 12th March, 1902, payable two months after date." Judgment for the plaintiff was signed in default of a dispute note, but afterwards the defendants filed a dispute note (what it contained was not shewn), and applied to SPINKS, Co. J., to have the judgment set aside and for leave to defend on the merits. On the hearing of the application it appeared that the Court had jurisdiction, as the note sued on was produced on affidavit, and it shewed on its face that it was made and payable within the county of Yale.

*Held*, on appeal from the order of the County Judge dismissing the defendants' application, that County Court process should shew jurisdiction on its face, but the defendants, by filing the dispute note, and applying for leave to defend on the merits, had waived their right to object to the jurisdiction.

Sir C. H. Tupper, K.C., for the appellants.

A. J. Kappeler, for the respondent.

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[DRAKE J., 23RD DECEMBER, 1902.]

*In re* LENORA MOUNT SICKER COPPER MINING CO.

*Company—Winding-up—Leave to bring action—Secured creditors—Proving claims.*

Summons on behalf of mortgagees for leave to commence a foreclosure action against a company which had been ordered to be wound up. For the mortgagees it was contended that they were entitled to exercise an option as to whether they would come in under the Winding-up Act or not, but, if they did not, they of course required leave to commence their action.

*Held*, that a secured creditor has a right to apply for and obtain leave to bring an action to enforce his security, but that it is not optional for him to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under ss. 63 *et seq.* of the Act.

F. Peters, K.C., for the applicants.

W. E. Oliver, for the liquidator.

## Judicial Committee of the Privy Council.

[12TH MARCH, 1903.]

CHAPPELLE v. THE KING.

CARMACK v. THE KING.

TWEED AND WOOG v. THE KING.

*Leave to appeal—Repealed mining regulations—Constitutional question—Ultra vires—Cross appeal without notice—Consolidation—Security—Cost of printing record.*

Applications on behalf of the several suppliants for special leave to appeal from the judgments of the Supreme Court of Canada, 32 S. C. R. 589, dismissing three petitions of right with costs (save as to judgment for \$10,429 in favour of Chappelle), and in part reversing the judgment of the Exchequer Court, 7 Ex. C. R. 414.

The suppliants' petitions, which were heard together, sought leave on the grounds (*inter alia*): (1) that the cases were test cases, upon which others depended; (2) that a substantial sum was involved; (3) that there were no disputed questions of fact; (4) that the Crown, and not the suppliants, took the appeals to the Supreme Court; (5) that the trial Judge and two Judges of the Supreme Court gave judgment for the suppliants, and hence that the weight of judicial opinion was equally divided; and (6) that the questions of law involved affected a large class, and included the right of the Dominion Government to impose, *in invitum*, and by order-in-council, a royalty or tax on gold mined in the Yukon, without any express antecedent legislative authority.

Argument was heard on the 4th March, 1903, by Lords Macnaghten, Shand, Davey, and Lindley, Sir F. North, Sir A. R. Scoble, and Sir A. Wilson.

*Travers Lewis*, for the petitioners, was stopped by the Board.

*H. S. Osler*, K.C., for the Crown. The cases are not of general importance, but merely involve the proper interpretation of certain grants, the form of which is now obsolete.

No future cases will be governed thereby. (Lord Macnaghten: Is that an equitable ground for justifying the decision?) The mining regulations in question have since been repealed, and an Act passed altering the whole position. (Lord Macnaghten: You do not propose to refund this money in dispute?) The royalty exacted really represents the suppliants' share of the expense of maintaining law and order in the Yukon, and was in reality the price they paid to enable them to produce gold in safety. (Lord Macnaghten: If they were not liable to pay for law and order, I suppose the Government would have to pay for it.) The order-in-council had been objected to as unconstitutional, but the real question at issue was whether it was not in effect a reservation of a royalty, and not a tax. The exclusive right to all the proceeds of their claim was granted to the miners, but the Crown in the same grant takes it away. The maxim *ut res magis valeat* ought peculiarly to apply. At all events, if an appeal be permitted, the Crown asks that Chappelle's whole case be reopened by way of cross-appeal.

*Travers Lewis*, in reply. No petition by the Crown for leave to cross-appeal has been lodged or served. The present informal motion should be treated as a substantive application, and sufficient grounds be shewn by the Crown. Every Judge, in both Courts below, has decided in Chappelle's favour *pro tanto*. No ground or reason is now suggested for reversing this decision. (Lord Macnaghten: That you will know in due time. It is not an unusual thing for the Board to allow. They may grant the indulgence, and allow the person against whom the appeal is brought to raise his case too.) If so, then the Crown should bear half the cost of the preparation and printing of the record: *Safford and Wheeler*, p. 749. (Lord Davey: I do not see why they should not bear half.) An appendix, containing the exhibits common to all the cases, was printed in the Supreme Court. In *Great North-West Central R. W. Co. v. Charlebois*, in 1897, a similar book was accepted by the Board without re-printing, and the present applicants seek a like indulgence. (Lord Macnaghten: Both parties agreeing, there is no reason why it should not be accepted.) The three cases were argued together below, and we ask that the records used on these applications be accepted as official. Also, that the three appeals be now consolidated, and that one security deposit, of £300 only, be exacted from the three appellants. (Lord Macnaghten: The Crown must present a petition for formal leave. You need not trouble yourself to come here again. The Crown is not required to make a deposit.)

THE BOARD, on the 12th March, 1903, made an order granting leave to appeal and cross-appeal; the Supreme Court record filed on the application accepted; the three appeals consolidated; the security deposit by the appellants fixed at £100 in each case; each side to bear one-half the cost of transcribing and printing the Privy Council record; and the appeals and the cross-appeal to be heard together, upon one printed case lodged on each side.

## ONTARIO.

### Supreme Court of Judicature.

#### COURT OF APPEAL.

DIVISIONAL COURT.]

[6TH MARCH, 1903.]

MONRO v. TORONTO R. W. CO.

*Partition—Parties—Tenants in common—Lease—Infant—Repudiation.*

The plaintiff, having when he came of age repudiated a lease to the defendants of land of which he and his brother and sister were tenants in common, made when he was an infant, and having made a partition by deed with his brother and sister, to which the defendants were not parties:—

*Held*, MACLENNAN, J.A., dissenting, that the brother and sister were necessary parties to the plaintiff's action for a partition as against the defendants in respect of their possession under the lease.

Judgment of a Divisional Court. 4 O. L. R. 36, 22 Occ. N. 231, reversed, and judgment of MEREDITH, C.J., *ib.*, restored.

*J. Bicknell*, K.C., for the appellants, defendants.

*C. Millar*, for the plaintiff.

MACMAHON, J.]

[14TH APRIL, 1903.]

LEE v. CANADIAN MUTUAL LOAN AND INVESTMENT  
CO.

*Building society—Mortgage—Mortgagor becoming shareholder—Liability for losses.*

It was held that, under the mortgage in question in this case and the by-laws and rules of the defendants and their

predecessors in interest applicable thereto, the plaintiff was entitled to a discharge of his mortgage, given in form as collateral security for the payment of shares subscribed for by him, upon payment of the principal and interest as therein provided; and that the defendants could not charge against the mortgage a share of losses incurred in the management of the company.

Judgment of MACMAHON, J., 3 O. L. R. 191, 22 Occ. N. 60, reversed.

*W. J. Clark*, for the appellant.

*G. F. Shepley*, K.C., and *A. McLean Macdonell*, for the respondents.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., FALCONBRIDGE, C.J., 6TH FEBRUARY, 1903.]

✓ NEELY v. PETER.

*Water and watercourses—Injury to land by flooding—Claim for damages—Summary procedure—Costs of action—Erection and maintenance of dam—Liability of owners—Tolls—Liability of lumbermen using dam—Injunction.*

The judgment of STREET, J., 4 O. L. R. 293, was affirmed for the reasons given by him; and, in addition to the damages awarded to the plaintiff against the added defendants, an injunction was granted restraining those defendants from penning back the waters of the river in question, but the operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R. S. O. 1897 c. 194, or otherwise.

*O. M. Arnold*, for the plaintiff.

*W. L. Haight*, for the defendants.

[MEREDITH, C. J., MACMAHON, J., 27TH FEBRUARY, 1903.]

✓ RUSSELL v. EDDY.

*Costs—Third party—Rule 214—Discretion—Appeal.*

Rule 214 gives power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the

defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R. S. O. 1897 c. 51, s. 72

*W. H. Blake*, K.C., for the plaintiff.

*T. E. Godson*, for the defendant.

✓ [MEREDITH, C. J., MACMAHON, J., 30TH MARCH, 1908.]

BEDELL v. RYCKMAN.

*Discovery—Examination of party—Production of documents—Company—Directors—Account of profits—Postponement of consequential discovery till liability established.*

An appeal from an order of BRITTON, J., affirming an order of the Master in Chambers, requiring one of the defendants to file a further and better affidavit on production, and to attend at his own expense to be further examined for discovery, was allowed and the orders below set aside.

The statement of claim displayed a single cause of action, based upon the proposition that the defendant C. and his associates, as to the transactions detailed in it, in the circumstances under which those transactions took place, stood in a fiduciary relation to the defendant company, which prevented them from making any profit for themselves out of the purchase of certain businesses acquired by them and afterwards transferred for a large sum of money to the defendant company, and the relief claimed was an account and payment by the individual defendant of the difference between the aggregate of the prices paid by them and what was paid by the company to them.

It was admitted that the individual defendants received from the defendant company a sum in cash and stock far in excess of what they paid for the businesses, and the only matters really in controversy were the liability of the defendants other than the defendant company, to account for the profit made by them on the transfer to the company of the properties, and, if liability were established, the amount for which they were answerable.

*Held*, that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account asserted by the plaintiff had been established.

The practice of the Court, as a general rule, is to postpone consequential discovery until liability has been established. The English rule from which our Rule 472 is taken

was adopted for the purpose of making uniform the practice in the cases with which it deals, and to enable the Court in any case to postpone consequential discovery until the right of the plaintiff should be established.

*W. H. Blake*, K.C., for the appellant.

*W. R. Riddell*, K.C., and *W. A. Lamport*, for the respondent.

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[*Boyd*, C., *Ferguson*, J., *MacLaren*, J.A., 7TH APRIL, 1908.

✓ VOIGHT BREWERY CO. v. ORTH.

*Judgment—Default judgment—Statement of defence—County Court—Appeal—Interlocutory or final order.*

An order made in an action in a County Court for service of notice of a writ out of the jurisdiction provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only \$103 but otherwise disputes plaintiffs' claim in this action."

*Held*, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void.

A motion by the defendant to set aside the judgment as irregular and void was dismissed by the County Court Judge, who gave the defendant leave, on payment of \$5, to move on the merits for leave to defend.

*Held*, that this was a final order and that an appeal lay therefrom.

*O'Donnell v. Guinane*, 28 O. R. 389, distinguished.

*F. E. Hodgins*, K.C., for the defendant.

*E. S. Wigle*, for the plaintiffs.

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[*Boyd*, C., *Ferguson*, J., 8th APRIL, 1908.

COBBAN MANUFACTURING CO. v. LAKE SIMCOE HOTEL CO.

*Mechanics' liens—Costs—"Actual disbursements"—R.S.O. 1897 c. 153, s. 43*

The "actual disbursements" which, by s. 42 of the *Mechanics' Lien Act*, R. S. O. 1897 c. 153, may be allowed as



against an unsuccessful claimant, in addition to an amount equal to twenty-five per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and *a fortiori* not counsel fees charged by the solicitor himself when acting as counsel.

Order of FALCONBRIDGE, C.J., affirmed.

A. E. H. Creswicke, for the appellants.

W. D. Gwynne, for the respondents.

[BOYD, C., 4TH APRIL, 1908.]

✓

GRIFFITH v. HOWES.

*Life insurance—Benevolent society—Certificate—Legal heirs designated by will—Election.*

A certificate issued by a benevolent society to a married woman on the 25th October, 1892, provided that the benefit was to be payable to her "legal heirs as designated by her will." She died on the 14th November, 1892, leaving her husband and three children her surviving. By her will, dated the 30th September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying thereout all debts due by me," and the residue to her children.

*Held*, that the bequest of the insurance money to the executors was inoperative; that it was payable to the three children as "legal heirs designated by will," and that the children were not bound to elect between the benefits specifically given to them and the insurance money.

G. M. Macdonnell, K.C., for the plaintiffs.

W. H. Sullivan, for the defendants.

[STREET, J., 2ND MARCH, 1908.]

REX v. MULLEN.

*Criminal law—Crown case reserved—Application for—Grounds—Misapprehension of jurors—Statements by.*

It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; it is contrary

to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case.

*G. S. Henderson*, for the defendant *Murphy*.

[STREET, J., 4TH APRIL, 1908.]

✓  
SMART v. DANA.

*Sheriff—Bond—Predecessor in office—Annuity out of revenues.*

Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay to him an annuity "out of the revenues of the said office."

*Held*, that fees received by the sheriff as returning officer at elections of members of Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that, as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during that year, the annuity for that year was payable.

*C. H. Ritchie*, K.C., for the plaintiff.

*A. B. Aylesworth*, K.C., and *M. M. Brown*, for the defendants.

✓  
[MEREDITH, J., 2ND APRIL, 1908.]

KRUG FURNITURE CO. v. BERLIN UNION OF AMALGAMATED WOODWORKERS.

*Trade union—Inducing breach of contract—Interference with business—Incorporation—Pleading.*

Damages are recoverable against a trade union and the members thereof in an action by employers of workmen when, by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers, and other workmen are prevented from entering into the employment in their stead.

It is too late at the trial, after a trade union has appeared and pleaded in an apparently corporate capacity, to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded.

*E. E. A. DuVernet* and *J. A. Scellen*, for the plaintiffs.

*J. P. Mabee*, K.C., and *E. P. Clement*, for the defendants.

## IN CHAMBERS.

✓ [BOYD, C., 6TH MARCH, 1908.]

## CRERAR v. CANADIAN PACIFIC R. W. CO.

*Mechanics' liens—Action—Practice—Affidavit verifying statement of claim  
—Particulars of residence of plaintiffs.*

In the case of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, the affidavit verifying the statement of claim, required by s. 31 (2), may be made by the plaintiffs' solicitor as agent.

The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor was also stated therein.

*Held*, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs.

*J. H. Spence*, for the plaintiffs.

*H. L. Drayton*, for the defendants Vigeon Brothers.

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[MEREDITH, J., 3RD FEBRUARY, 1903.]✓ *In re* LLOYD AND PEGG.

*Arbitration and award—Order for leave to enforce award—Time—Arbitration Act, s. 45—Motion to set aside award.*

An application under s. 13 of the Arbitration Act, R. S. O. 1897 c. 62, for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award.

Section 45 of the Act does not apply to such an application, but only to applications to set aside awards.

An order under s. 13 is necessary when the reference has been made out of Court.

Objections properly the subject of a motion to set aside the award were not considered upon appeal from an order under s. 13.

*A. B. Armstrong*, for Pegg.

*R. L. Johnston*, for Lloyd.

[MEREDITH, J., 8RD FEBRUARY, 1903.

✓ *In re* BROWN AND SLATER.

*Will—Construction—Life estate—Estate tail—Survivorship—Disentailing deed—Condition of devise—Bearing testator's name—Vendor and purchaser.*

A testator devised the lands "whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father.

*Held*, that the testator's son took a life estate only, and the surviving daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee.

*Held*, also, that the condition as to continuing to bear the testator's name did not prevent the daughter, being unmarried, from conveying in fee.

*A. W. Brown*, for the vendor.

*W. T. Evans*, for the purchaser.

✓ [THE MASTER IN CHAMBERS, 8RD APRIL, 1903.

CHANDLER AND MASSEY, LIMITED, v. GRAND TRUNK  
R. W. CO.

*Restored—23, C.L.J. 194.*

*Parties—Joinder of defendants—Alternative claims—Rule 186.*

A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price.

*Held*, that this could not be done, the relief claimed against the railway company being based on the assumption

that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him.

*Quigley v. Waterloo Manufacturing Co.*, 1 O. L. R. 606, and *Evans v. Jaffray*, 1 O. L. R. 614, applied.

*D. L. McCarthy*, for the defendant company.

*W. A. Sadler*, for the plaintiffs.

*C. A. Moss*, for the defendant Kerr.

## In the Tenth Division Court in the County of York.

✓ [MORSON, JUN. CO. J., 8TH APRIL, 1908.]

### EBY-BLAIN CO. v. FRANKEL.

*Conversion—Purchase of goods—False pretences of supposed agent of purchaser—Contract—Consensus ad idem.*

An action for damages for the conversion of some lead, fraudulently obtained from the plaintiffs, by one Harris, under the false pretence that he was purchasing as agent for the defendants.

*Shirley Denison*, for the plaintiffs.

*James Baird*, for the defendants.

MORSON, JUN. CO. J.—It appears from the evidence that Harris fraudulently represented to the plaintiffs that he was the agent of the defendants, sent by them to make the purchase. He was not, as a fact, in the defendants' employ; they did not send him to make the purchase, nor did they know he was going to do so; but, on the contrary, after he had so fraudulently obtained the lead, they purchased it from him and paid him in full without any knowledge where he had purchased it. The lead was subsequently sold by the defendants in the ordinary course of their business. The plaintiffs, at the time of the pretended contract, thought they were selling to the defendants, through their agent Harris, and, after delivery to Harris, they sent the invoice to the defendants, claiming \$51.28, the purchase price. They

then, for the first time, discovered that Harris had no authority from the defendants, and had obtained possession of the lead under false pretences. They thereupon brought this action for damages for conversion, the conversion being, the selling the lead by the defendants without having first acquired a title to it. The plaintiffs' right to succeed depends, then, solely on whether the property in the lead passed to the defendants, under the circumstances I have stated, for, if it did not, the defendants were guilty of conversion. Now, in law, property can only pass from one party to another, by force of a contract. Lord Chancellor Cairns, in *Cundy v. Lindsay*, 3 App. Cas. 459, so decides. The facts there were as follows:—A dishonest man, Blenkarn, by letters and applications and otherwise, fraudulently led and intended to lead the Messrs. Lindsay to believe that they were dealing with a reliable firm, Blenkirn & Co., and as a result they shipped goods to Blenkirn & Co., but the goods were received by Blenkarn, who subsequently sold some of them to the Messrs. Cundy. On discovering the fraud, the Messrs. Lindsay then brought an action against the Messrs. Cundy for conversion, and at the trial were successful, but on appeal the judgment was reversed; it being held by the House of Lords that there was no contract, and therefore the property never passed. At p. 464 the Lord Chancellor says: "In the first place, if the property in the goods passed, it could only pass by way of contract. There is nothing else which could have passed the property." Applying, then, this principle to the present case: was there any contract under which the property passed from the plaintiffs to the defendants? If there was not, the plaintiffs must succeed. If there was, they must fail.

It is an elementary principle of law that, in order to constitute a contract, there must be two parties to it, whose minds must come together. There must be, in other words, a consensus ad idem. Was there any in this case? There clearly was not. On the undisputed facts, the defendants had not authorized Harris to act on their behalf, and were ignorant of his having done so. They did not even know, when they bought the lead from him, that he had obtained it from the plaintiffs. How, then, could it be said under these circumstances that their minds and the plaintiffs' minds, came together at the time when Harris fraudulently pretended to act for them, and obtained possession of the lead as their fraudulent agent? The language of the Lord Chancellor, again, on p. 465, is applicable, where he says:—"Stating the matter shortly, in that way, I ask the question,

how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought, with him they never intended to deal, their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement, or any contract whatever. As between him and them there was merely the one side to a contract,—where in order to produce a contract, two sides would be required. With the firm of Blenkarn & Co. there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.”

If, then, the plaintiffs’ minds and the defendants’ minds never came together, and they did not know each other in the transaction, there clearly could not be, and was not, any contract between them—and the property in the lead therefore never passed to the defendants. It could not be said either that there was any contract with Harris so as to pass the property to him, because, on the plaintiffs’ evidence and as they themselves shew, they made no contract with him, but they dealt with the defendants, through him as their agent. They were, in other words, dealing with the agent of a disclosed principal, and under the circumstances it could not be said the contract was with the agent. It may seem perhaps hard upon the defendants that notwithstanding the fact that the plaintiffs thought they were dealing with them and intended to pass and thought they had passed the property in the lead to them, they nevertheless should, after getting possession of it, be guilty of conversion. The reason, however, is to be found in the fact that the plaintiffs’ intentions, by themselves, not communicated to the defendants in any way, did not constitute a contract, because of the want of consensus of mind already referred to, without which there could be no contract, and therefore no passing of the property. The defendants’ misfortune was in dealing with a man like Harris, it is true, innocently, but that does not avail them. There is no wrong, however, in law, without a remedy, and they have their redress against Harris. The defendants contended at the trial that, as the goods were obtained by false pretences, and not by theft, the property in them passed. While this is one of the distinctions between theft and false pretences, referred to in the notes in Taschereau’s Criminal Code, it has, in my opinion, no application to the present case.

The false pretences referred to in the Code, relate to acts between the prisoner and the complainant, and not, so far as the passing of property is concerned, to cases where an agent falsely pretends to act on behalf of another. Section 838 of the Code in no way affects the question of the title to goods. Neither does the provision as to restitution of stolen property. If the pretended contract had been between the plaintiffs and Harris, it would have been otherwise, for then the property would have passed under a contract, which was not void, but voidable on the ground of having been obtained by the false pretences. There would be then in that case what the law requires to pass the property, namely, a contract between the parties,—but which, in the present case, there is not, for the reasons I have stated.

I must find on the evidence, then, that the defendants were guilty of conversion, and are liable to pay the plaintiffs as damages the amount claimed.

Judgment will, therefore, be for the plaintiffs for \$51.23 and costs.

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## NOVA SCOTIA.

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### In the Supreme Court.

#### IN CHAMBERS.

[TOWNSHEND, J., 18TH APRIL, 1903.]

#### MILLER v. NICHOLLS.

*Vendor and purchaser—Rents of land—Apportionment—Contract—Conveyance—Apportionment Act, R.S.N.S. c. 150.*

Stated case. The facts appear from the judgment.

*J. A. Chisholm*, for the plaintiff.

*H. McInnes*, for the defendant.

TOWNSHEND, J.—This is a stated case in which the question for the determination of the Judge is whether the plain-



tiff is entitled to an apportionment of rents to the time of the delivery of the deed.

The plaintiff sold to defendant on the 29th May, 1902, a property in the city of Halifax. The contract is contained in a written offer made and accepted in writing on that day. A portion of the property was at the time under lease to a tenant whose term commenced on the 1st May, 1902, and was then unexpired. The plaintiff claims an apportionment of the rents between the 1st May and the 24th June, when the deed was delivered. The defendant claims all the rents from the 1st May.

It is not disputed that at common law the purchaser on becoming the owner was entitled to all rents accruing from the property conveyed in the absence of any reservation. The written contract is silent on the subject, and the legal rights must prevail. The plaintiff rests his claim on R. S. N. S. c. 150, s. 2, by which it is declared that all rents, etc., shall, like interest on money lent, be considered as accruing from day to day, etc., etc., and shall be apportionable in respect to time accordingly.

Now, in my opinion, this statute has no application here as between vendor and purchaser, and is obviously intended for a different class of cases, that is to say, where property by devolution of law comes to the heir, or some succeeding owner, during the existence of a tenancy; then, as between the executor or administrator and the next taker, the law apportions the rents, giving to the representatives of the deceased that portion which accrued during his lifetime and the remainder to the party who succeeds to the title. Sections 4 and 5, I think, make this quite clear. Such was the view taken of the same statute in Ireland, as will be seen in the case of *In re Richard Dawson*, L. R. Ir. 21 Ch. 441. According to this view, there can be no doubt the defendant purchaser is entitled to the whole of the rents.

Mr. Chisholm, for the plaintiff, has contended that, as the delivery of the deed was not to prejudice the claim made for an apportionment of the rents, the only question for me to decide was "what rights the parties had to the rents under exhibits A. and B. before the deed passed, that is to say, under the written contract for sale and purchase." I do not see that the legal right would be different, assuming, as I would, that the contract was a valid and binding one and made certain reservations, of which the right to the rents or a portion was not one; the purchaser became entitled to the property with all rights attaching thereto when the contract

was closed, and on making or tendering the price agreed could have enforced performance without agreeing to apportion the rents. The question as to plaintiff's right to an apportionment would be exactly the same when the contract was signed, as when the deed was delivered. If the plaintiff had the right to a portion when the agreement was made, so had he after the deed was delivered. Nothing occurred to displace or vary the rights of either party between the making of the agreement and delivery of the deed.

I am therefore of opinion that the plaintiff is not entitled to any portion of the rent, and decide accordingly.

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## Supreme Court of Canada.

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ONTARIO.]

[20TH APRIL, 1908.]

### LEWIS v. DEMPSTER.

*Contract—Sale of monument—Sample—Evidence—Questions of fact—Reversal of judgment.*

There is no rule of law or of procedure which prevents the Supreme Court or an intermediate court of appeal from reversing the decision at the trial on the facts.

In an action for the price of a tombstone, the defence was that it was not of the design ordered. It had been ordered from photographic samples, and an order form was filled in, which, when produced at the trial, contained the words "E. M. Lewis Reporter Design," which the defendant asserted were not in it when it was signed by him, but which were there two or three hours later when handed to one of the vendors by their foreman who had taken the order and filled in the form. The evidence at the trial was conflicting, and the Chancellor, trying the case without a jury, dismissed the action. His judgment was reversed by the Court of Appeal (1 O. W. R. 602).

*Held, per* TASCHEREAU, C.J., that the evidence established that the words in dispute were in the order when it was signed, and the plaintiffs were entitled to recover.

*Held, per* SEDGEWICK and DAVIES, JJ., MILLS, J., *hæsi-tante*, that, even if these words were not originally in the order, the circumstances disclosed in evidence shewed that the design supplied was substantially that ordered; and the judgment appealed from should stand.

*Held, per* GIROUARD, J., dissenting, following *Village of Granby v. Menard*, 31 S. C. R. 14, that the evidence being contradictory and the trial Judge having found for the defendant, which finding the evidence warranted, his judgment should not have been reversed on appeal.

*G. H. Watson*, K.C., and *T. Hislop*, for the appellant.

*A. B. Aylesworth*, K.C., and *J. N. Fish*, for the respondents.

✓  
HENNING v. MACLEAN.

*Will—Construction—Alternative disposition—Death of testator and wife  
“at the same time.”*

H. by his will provided for disposal of his property in case his wife survived him, but not in case of her death first. The will also contained this provision: “In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time, I request the following disposition to be made of my property.” . . . H. died sixteen days after his wife, but made no change in his will.

*Held*, affirming the decision of the Court of Appeal, 4 O. L. R. 666, 22 Occ. N. 405, which affirmed the judgment of a Divisional Court, 2 O. L. R. 169, 21 Occ. N. 434, that H. and his wife were not deprived of life at the same time, and he therefore died intestate.

A. B. Aylesworth, K.C., for the appellants.

H. J. Scott, K.C., H. O'Brien, K.C., and J. G. O'Donoghue, for the respondents.

THORNE v. PARSONS. ✓

*Will—Devise of all testator's property—Chose in action.*

A devise of all “my real estate and property whatsoever and of what nature and kind soever,” at a place named, does not include a debt due by the devisee, who resided and carried on business at such place, to the testator.

Judgment of the Court of Appeal, 4 O. L. R. 682, 22 Occ. N. 379, affirmed.

D. O. Cameron, and T. J. Blain, for the appellants.

S. H. Blake, K.C., and D. W. Saunders, for the respondents except W. H. Thorne.

W. T. J. Lea, for the respondent W. H. Thorne.

NOVA SCOTIA.]

[26TH MARCH, 1903.]

LIVERPOOL AND MILTON R. W. CO. v. TOWN OF LIVERPOOL.

*Municipal corporations—Operation of railway—Use of streets—Regulations—Crossings—Powers—By-law or resolution—Construction of statute.*

By the Nova Scotia statute 63 V. c. 176, the appellant company were granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town

council might from time to time see fit to make to secure the safety of persons and property.

*Held*, reversing the judgment appealed from, DAVIES, J., dissenting, that such regulations could only be made by by-law, and that the by-law making such regulations would be subject to the provisions of s. 264 of the Towns Incorporation Act, R. S. N. S. 1900, c. 71.

*E. L. Newcombe*, K.C., for the appellants.

*W. B. A. Ritchie*, K.C., for the respondents.

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## ONTARIO.

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Supreme Court of Judicature.

✓ COURT OF APPEAL.

FALCONBRIDGE, C.J.]

[14TH APRIL, 1908.

HOLDEN v. TOWNSHIP OF YARMOUTH.

*Way—Non-repair—Injury to person—Approach to railway crossing—Neglect of railway company to fence—Municipal corporation—Relieving enactment.*

By s. 611 of the Municipal Act, R. S. O. 1897 c. 223, first introduced in 1896, no liability is now imposed on a municipal corporation by reason of want of repair of railway crossings through there being too high a grade and the omission to fence, the obligation therefor being under s. 186 of the Dominion Railway Act, 51 V. c. 29, imposed on the railway company.

Where, therefore, under s. 186, the approach to a railway crossing must not be more than one foot rise or fall for every twenty feet of the horizontal length of such approach, unless a good and sufficient fence shall be made by the railway company on each side thereof, and in this case the grade line was four feet without any fences, the municipal corporation was held relieved from liability to a person who was injured.

*A. B. Aylesworth*, K.C., for the appellant township corporation.

*W. R. Riddell*, K.C., for the plaintiffs.

MORGAN, JUN. CO. J. YORK.] ✓

[14TH APRIL, 1903.]

*In re* EQUITABLE SAVINGS, LOAN, AND BUILDING  
ASSOCIATION.

*Company—Winding-up—Final order—Appealable order—Order dissolving  
company—Order rescinding.*

On the 24th March, 1902, a County Court Judge made an order, upon an affidavit of one of the liquidators, declaring that the above named association should be and was dissolved. On the 21st June, 1902, upon the application of a certain dissatisfied shareholder, an order was made by the Judge revoking his former order, and also another order which had been made by him on the 7th April, 1902, that no action should be proceeded with against the association except by leave of the Court.

*Held*, that the order of the 21st June, 1902, was an appealable order, for, even if the appeal to the Court of Appeal given by s. 27 of the Winding-up Act was to be restricted in its construction to appeals from final orders, yet the order of the 21st June, 1902, might be properly described as a final order, since it put an end to the order of dissolution theretofore made.

*Held*, also, MACLENNAN, J.A., *dissentiente*, that the County Court Judge had no authority to make an order such as the one of the 21st June, 1902, inasmuch as he had no other material before him when making the order than he had when making that of the 24th March, and there was no reason for saying that he had been misled in making the former order or that any fact had been suppressed; and that, therefore, the proper way to have attacked the order of the 24th March was by appeal, and not by application to the Judge to rescind it after it had been acted upon and become effective.

*Held*, *per* MACLENNAN, J.A., that the County Court Judge had been misled when making the order of the 24th March, 1902, inasmuch as he made it upon an affidavit that the affairs of the association had been duly wound up by the liquidators, which was not the case, and that the County Court Judge had therefore authority to make the order rescinding it, whether such authority is to be rested upon Rule 358 or upon the well established and general practice of the Court independent of express Rules.

A. B. Aylesworth, K.C., and A. McLean Macdonell, for the appellants.

G. F. Shepley, K.C., and C. D. Scott, for the respondents.

[MAGLENNAN, J.A., FALCONBRIDGE, C.J., 18TH MARCH, 1908.

*In re* EAST MIDDLESEX PROVINCIAL ELECTION.

ROSE v. RUTLEDGE. ✓

*Parliamentary elections—Corrupt practices—Agency—Delegates to nominating convention—Authorization—Treating—Meetings of electors—Treating by “candidate”—Previous habit of treating—Rebuttal of presumption—Absence of corrupt intent.*

The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and, in acknowledging and accepting the nomination, he said: “There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you.”

*Held*, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election.

The respondent requested M., who was at the convention as a delegate, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over, and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would go to the inn, he would “leave a drink for them there.” This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it.

*Held*, that a charge of treating a meeting assembled to promote the election, under s. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under s. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men.

Upon a charge of treating a committee meeting held at an hotel, the evidence was that McC., one of the delegates to the convention, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made.

*Held*, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence.

The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election.

*Held*, that under s.-s. 2 of s. 162 (added by 62 V. (2) c. 5, s. 7 (O.)), treating generally or extensively or miscellaneously is only *prima facie* a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of s.-s. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent.

*Held*, also, that, although the respondent did not become a "candidate," within the meaning of s. 2, s.-s. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected.

*Youghal Election*, 3 Ir. R. C. L. 53, 1 O'M. & H. 291, followed.

It was shewn that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ for the election was issued, on the 22nd April.



*Held*, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided.

*West Wellington Case*, 1 E. C. 16, distinguished.

*W. Cassels*, K.C., *E. Meredith*, K.C., *W. D. McPherson*, and *P. H. Bartlett*, for the petitioners.

*A. B. Aylesworth*, K.C., and *J. M. McEvoy*, for the respondent.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., STREET, J., 4TH MARCH, 1908.]

DAVIDSON v. GRAND TRUNK R. W. CO.

*Railway—Defective fencing—Cattle getting on to highway and then on to track—Negligence.*

The plaintiff was the owner of a field, bounded on the one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed, and, going over the land of a private owner, which was not fenced off from the switch, and then along a lane, she got on to the highway, and then proceeding along the highway she got to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train.

*Held*, that the defendants were liable therefor.

*James v. Grand Trunk R. W. Co.*, 31 S. C. R. 420, distinguished.

*D. L. McCarthy*, for the defendants.

*T. E. Godson*, for the plaintiff.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 4TH MARCH, 1908.]

HUNSBERRY v. KRATZ.

*Attachment of debts—Interest of debtor under will—Residuary legatee.*

A primary creditor in a Division Court, by garnishee summons served on the executors, attached the interest of the

primary debtor, as residuary legatee, in the estate of a testator who had died within a year of the attachment. A receiver was subsequently in a High Court action appointed to receive his interest.

The Judge in the Division Court gave judgment against the garnishee, and an application for a new trial by the garnishee, on the ground that such interest was not attachable, was dismissed, but on an appeal to a Divisional Court:—

*Held*, that the residuary legatee's interest was not such a debt as could be attached; and the garnishees were discharged.

*H. H. Collier*, K.C., for the garnishees.

*J. A. Keyes*, for the primary creditor.

[12TH MARCH, 1908.]

✓  
**REX v. WALSH.**

*Constitutional law—Liquor Act of Ontario, 1902—Referendum—Question left to electors—Power of Legislature—Trial of offenders—Constitution of Court—"To conduct the trial"—Trial and sentence—County Judge—Special Court—Issue of summons—Adjournment for sentence.*

On a motion to quash a conviction for attempting to put a paper other than the ballot paper authorized by law into a ballot box, contrary to the provisions of s. 191 of the Ontario Election Act and s. 91 of the Liquor Act, 1902:—

*Held*, that the reference by the Legislature of such a question as that mentioned in s. 2 of the Liquor Act, 1902, to the vote of electors, instead of the Legislature itself deciding it, is unusual but well within the powers of the Legislature.

*Held*, also, that the intention of the Legislature under s.-s. 4 of s. 91 was to create a tribunal with authority to try certain specific offences; that the Court so created had power under the words "to conduct the trial" to bring the party charged before the Court, try him for the offence, and sentence him if found guilty; that the County Judge appointed to conduct the trial does not act as a County Judge but as a Court specially created; that it was intended that he should act out of his own county in holding the actual trial; that he may issue his summons in his own county or elsewhere; and has power, after finding the accused guilty, to adjourn the Court to a subsequent day for the purpose of passing sentence.

Section 191 of R. S. O. 1897 c. 9 is wide enough not only to meet the case of an offending returning officer or deputy returning officer, but that of any other person.

*J. A. Robinson*, for the defendant.

*J. R. Cartwright*, K.C., and *D. J. Donahue*, K.C., for the Crown.

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[28TH MARCH, 1908.]

### NOLAN v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

*Life insurance—Action on policy—Condition as to award—Application to stay proceedings.*

In an action on a policy on which was indorsed a condition that, in case any question should arise, "it is a condition of this policy which the assured by the acceptance thereof agrees to abide by . . . every such difference shall be referred to the arbitration and decision of a mutual person . . . and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable . . . and it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided also that compliance with the stipulations indorsed hereon is a condition precedent to the right to recover on this policy," etc.

*Held*, that no action lay, nor did the amount payable under the policy become due, until the determination of the arbitrator to be appointed under the agreement to refer contained in the condition; that the plaintiff could not claim under the policy without assenting to its terms; and that the condition was not in contravention of s. 80 of R. S. O. c. 203.

*Spurrier v. LaCloche*, [1902] A. C. 446, followed.

Order of *MEREDITH*, J., 2 O. W. R. 98, affirmed.

*S. Alfred Jones*, for the plaintiff.

*H. Cassels*, K.C., for the defendants.

# CROMPTON AND KNOWLES LOOM WORKS v. HOFFMAN.

*Damages—Breach of warranty—Manufacture and sale of machine—Defects—Making good—Loss of profits—Allowance on price—Property not passing.*

The plaintiffs agreed to manufacture a goring loom fit for certain special work required by the defendants, and to deliver it by a certain time. The machine was not delivered until after the time fixed, and when delivered did not have certain fittings which were necessary for its proper working, and there were certain defects in it which the defendants, after applying to the plaintiffs to remedy them, had to rectify themselves.

In an action for the price of the loom:—

*Held*, that the defendants should be allowed the sums paid in supplying the missing portions of the machine and for the services of an expert to put it in working order; that, notwithstanding that the property in the machine remained in the plaintiffs until paid for, the plaintiffs never had supplied a loom properly constructed to do the work required of it, and to do which the plaintiffs well knew the machine had been ordered; that there was a warranty that it should be fit for that purpose; that the defendants were prevented from earning the profits they would have earned if the loom had been complete; and that, under the circumstances, the plaintiffs were liable to make such profit good.

Judgment of MACMAHON, J., 1 O. W. R. 717, reversed in part.

G. G. McPherson, K.C., for the defendants.

E. Sydney Smith, K.C., for the plaintiffs.

[80TH MARCH, 1908.]

# SMALL v. AMERICAN FEDERATION OF MUSICIANS.

*Contempt of Court—Motion to stay appeal by defendants in contempt—Disobedience to injunction—Unincorporated association—Body improperly served with process—Costs.*

On a motion by the plaintiff to stay a pending appeal by the defendants from an order dismissing an application to set aside service of the writ of summons on an individual for the

defendant association, on the ground that the association was not an incorporated body or a partnership and could not be served as a body, the plaintiff alleging that the defendants were in contempt for disobedience of an injunction:—

*Held*, following *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn.*, ante 152, 1 O. W. R. 183, that the association was not a body capable of being sued or being served, and so was not capable of being enjoined or of committing a contempt, and that, as the very object of the appeal was to determine whether it could be sued and served with process, it could not be determined whether a contempt had been committed without hearing the appeal.

*Held*, also, that the rule is not universal that persons guilty of contempt can take no step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself, and, as the defendants here were ordered to appear within ten days on pain of having judgment signed against them, they had the right to shew, if they could, that the service upon them was not permitted by the practice; and the motion was refused under the circumstances without costs.

*Fry v. Ernest*, 9 Jur. N. S. 1151, and *Ferguson v. County of Elgin*, 15 P. R. 399, followed.

*C. A. Moss*, for the plaintiff.

*J. G. O' Donoghue*, for the defendants.

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[4TH APRIL, 1903.]

*In re* JOHNSON, CHAMBERS v. JOHNSON.

*Will—Construction—Bequest for use of a church—Trust—Mixed fund—Perpetuity—Abatement of legacies—Mortmain Acts.*

A testator, who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed \$2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the trustees of the church.

*Held*, a good bequest.

*Held*, also, that the assignment by N. W. to the trustees of the church was a valid exercise of the discretion given him by the will.

Judgment of BOYD, C., 1 O. W. R. 806, affirmed.

*J. G. O'Donoghue*, for the appellants.

*D. W. Saunders*, for the trustees of the church.

*W. M. Douglas*, K.C., for the executors.

### ✓ REX v. LEWIS.

*Criminal law—Justice of the peace—Summary conviction—Master and Servant Act—Information—Nature of offence—Reference to Act—Amendment of information without re-swearing—Absence of objection—Form of conviction—Omission of date and place of offence—Amendment—Heading of conviction—Costs—Distress.*

The prosecutor hired the defendant to work for him on a farm and purchased a railway ticket to get the defendant to his farm. The defendant worked a few hours at the farm, but not long enough to repay the price of the ticket, refused to work any longer, and left the farm. The prosecutor then swore to an information before a justice of the peace that "W. L. did . . . accept the sum of \$1.30 to pay his fare to B. on the condition that the said amount was to be worked out, and that the said W. L. refused to work after reaching this place, with the exception of four hours and thirty minutes."

The magistrate issued a warrant, with the facts stated in the information substantially set out, and these words added, "consequently obtaining money under false pretences," and the defendant was arrested. The magistrate amended the information by adding "as per section 14 (5a), Master and Servant's Act, Ontario Statutes, 1901," but the information as amended was not re-sworn. The amended information was read over to the prisoner, and he was informed he was to be tried under it as amended. He made no objection; the prosecutor gave evidence, and the prisoner was sworn and gave evidence on his own behalf; and the magistrate adjudged that he should be fined \$5 and \$4.88 costs, and if the amounts were not paid forthwith he was to be committed to gaol. A note of the conviction was made, and a formal conviction drawn up. After an hour in custody the prisoner gave security and was released. The conviction form was headed, "con-

viction for a penalty to be levied by distress," but no such term was mentioned in the body of it.

*Held*, that the nature of the offence intended to be charged against the defendant was sufficiently clear in the original information, and any doubt was removed by the addition to it of the reference to the Act.

*Held*, also, that the information having been read over to, and the trial proceeding without objection by, the prisoner, and the magistrate having the prisoner before him, even if brought there improperly, he might try him on the amended information not resworn, although the Act under which he was tried required an information on oath, provided he did not protest.

*Held*, also, that the Court, being satisfied that an offence of the nature described in the conviction had been committed, and that the magistrate had jurisdiction, and that the punishment imposed was not excessive, should not hold the conviction invalid because the date and place of offence were not stated, there being power to amend.

*Held*, also, that the heading formed no part of the conviction, which was correctly drawn under the statute.

*Held*, also, that the costs of conveying the accused to gaol being omitted, was a matter which could be amended, if necessary, but here there were no such costs, as the prisoner never went to gaol.

*Held*, also, that there was special power by 1 Edw. VII. c. 12, s. 14, under which the prisoner was convicted, to award imprisonment in default of payment; and that by R. S. O. 1897 c. 90, s. 4, that power covered costs as well as fine.

*S. B. Woods*, for the prisoner.

*J. Bicknell*, K.C., for the prosecutor.

*A. E. Scanlon*, for the magistrate.

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[11TH APRIL, 1908.]

✓ PRING v. WYATT.

*Malicious prosecution—Reasonable and probable cause—Nonsuit—Search warrant—Theft—Information not charging crime.*

The defendant, with a collie dog, was passing the plaintiff's house when the plaintiff and his son claimed the dog

as theirs and took possession of it. The defendant went to a magistrate and stated the facts, and the magistrate drew an information stating that plaintiff did "unlawfully have and keep in his possession and take away a black collie dog . . . the property of the complainant," which was sworn by the defendant; a search warrant was issued to a constable, who took the dog out of the plaintiff's possession, he insisting that it was his dog. The constable then laid an information against the plaintiff, charging that he "unlawfully did have and keep in his possession a black collie dog, the property of" the defendant, and the plaintiff was summoned. Before the magistrate the plaintiff's counsel objected that the information and summons did not charge the plaintiff with any offence, and, at the request of the defendant and his counsel, the information was amended by inserting the words "steal and take away." The magistrate dismissed the charge.

In an action for malicious prosecution:—

*Held*, that the defendant, having fairly stated the facts to the magistrate, was not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue the search warrant, nor for summoning the plaintiff apparently to dispose of the question as to the property in the dog.

*Held*, also, that there was evidence that the defendant assented to the alteration charging the plaintiff with the crime of theft and his prosecution on that charge, and that the defendant was not justified in charging the plaintiff with having stolen the dog, because he believed the dog was his own; that the real question was not whether the defendant believed the dog to be his own, but whether he believed that the plaintiff had stolen him, that is, taken him without any belief that he had the right to take him; and that the trial Judge should have left the case to the jury, telling them that, if they found that the defendant had authorized the charge of theft and honestly believed when the amendment was made that the plaintiff had stolen his dog, they should find for the defendant; otherwise they should find for the plaintiff; the case should not have been taken from the jury upon the ground that reasonable and probable cause for a criminal prosecution had been shewn; and a new trial was ordered.

Judgment of the County Court of Middlesex reversed.

*J. H. Moss*, for the plaintiff.

*J. R. Meredith*, for the defendant.



✓ STREET, J., BRITTON, J., 17TH APRIL, 1908.

MOINNES v. TOWNSHIP OF EGREMONT.

*Way—Non-repair—Injury to person—Municipal corporation—Negligence—  
Bridge—Absence of railing—Notice of accident—Requirements of—  
Mistake in date—Damages.*

Action for damages sustained by plaintiff, who was crossing a bridge in the defendants' township during a thunderstorm between 9 and 10 o'clock at night on the 6th May, 1902, when a sudden flash of lightning caused his horse to swerve, and the horse's foot went into a gap in the logs of which the bridge was constructed, close to the edge of the bridge, and, there being no railing at the side of the bridge, they all fell over into the water, which was within 18 inches of the bottom of the bridge, and the plaintiff sustained injury. On the 26th May the plaintiff gave notice to the defendants of the accident as having occurred on the 7th May, instead of on the 6th May, describing the circumstances and stating it was during a thunderstorm, and also that he had rescued his horse by the aid of a certain neighbour, whom he named.

*Held*, that the cause of the accident as a matter of law and fact was the negligence of the defendants in not providing the bridge with a proper railing, and that the thunderstorm was one of those ordinary dangers which ought to have been thus provided against, and that the notice given to the defendants was sufficient within s.-s. 3 of s. 606, of the Municipal Act, and the defendants were liable; and the damages (\$200) were not excessive.

W. H. Kingston, K.C., for the defendants.

A. G. McKay, K.C., for the plaintiff.

[28TH APRIL, 1908.

PUTERBAUGH v. GOLD MEDAL CO.

*Defamation—Proof of publication—Letter given to clerk to copy—Privilege.* L<sub>1</sub>

*Held*, that the fact that the manager of the defendant company had, in the ordinary course of the correspondence of the company, handed to the company's stenographer to be typewritten by him a draft letter containing defamatory state-

ments, but of a privileged character, did not amount to such a publication of the letter as to take away the privilege.

*Bozsus v. Goblet*, [1894] 1 Q. B. 842, followed.

*F. C. Cooke*, for the defendants.

*J. E. Jones*, for the plaintiff.

[MEREDITH, C. J., FERGUSON J., 15TH MAY, 1903.]

CHANDLER AND MASSEY, LIMITED, v. GRAND TRUNK  
R. W. CO.

*Parties—Joinder of defendants—Alternative claims—Rules 196, 192.*

The order of the Master in Chambers, *ante* 172, which had been reversed by a Judge in Chambers, was restored.

*D. L. McCarthy*, for the defendant company.

*W. A. Sadler*, for the plaintiffs.

*C. A. Moss*, for the defendant Kerr.

[BOYD, C., 28TH MARCH, 1903.]

ATTORNEY-GENERAL v. TORONTO GENERAL TRUSTS  
CORPORATION.

*Costs—Special case in action to recover succession duty—Costs payable by Crown where unsuccessful.*

In litigation under the Succession Duty Act express power is given to the High Court to deal with the costs thereof; and where, therefore, the trustees of an estate had paid, or were ready to pay, all the duty which could properly be claimed against it, they were held entitled against the Crown to the costs of a special case and an action by the Attorney-General to recover higher duties; but only one set of costs was allowed to the trustees and beneficiaries.

*W. E. Middleton*, for the plaintiff.

*A. E. Knox*, for the defendant company.

*J. D. Falconbridge*, for the adult beneficiaries.

[OSLER, J.A., 19TH MARCH, 1908.]

✓  
KENNAN v. TURNER.

*Assessment and taxes—Tax sale—Invalidity—Onus—Proof of taxes in arrear—Omission of clerk to furnish treasurer with assessor's return—Irregularity—Action not commenced within three years—Pleading—Amendment.*

In an action brought on the 23rd April, 1902, for a declaration that a tax sale and conveyance under which the defendants claimed title to, and were in possession of, a certain town lot, were illegal and void as against the plaintiffs, the rightful owners, the plaintiffs proved a sufficient paper title. It was also proved that one of the defendants was in possession and had erected a valuable building, claiming title under a sale by the town treasurer, made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in pursuance thereof on the 15th November, 1899, registered 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance, duly registered, to the defendant in possession.

*Held*, that the onus of proof of the invalidity of the tax title rested on the plaintiffs.

Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by s. 152 of the Assessment Act, R. S. O. 1897 c. 224, liable to be sold in 1898 for such arrears.

The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do by the last clause of s. 153, with a true copy of the list furnished by the latter under s. 152, with the assessor's return, certified to by the clerk under the seal of the corporation.

*Quaere*, whether this requirement of s. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation.

*Love v. Webster*, 26 O. R. 453, distinguished.

*Held*, however, that as in this case the omission worked no injury to the plaintiffs, who had all the notices and delays

to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and as the action was brought more than three years after the sale and more than two years after the deed, the defendants should have leave to plead in answer to it ss. 208 and 209 of the Act, and thereupon the action should be dismissed.

*J. E. Irving*, for the plaintiffs.

*W. H. Hearst*, for the defendants.

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[FALCONBRIDGE, C.J., 20TH MARCH, 1908.]

✓  
**REX ex rel. ZIMMERMAN v. STEELE.**

*Municipal elections—County councillor—Disqualification—Membership in school board “for which rates are levied”—Resignation between nomination and polling—Relator’s claim to seat—Notice to electors.*

By 2 Edw. VII. c. 29, s. 5 (O.), s. 80 of the Municipal Act, R. S. O. 1897 c. 223, is amended so as to provide that “no member of a school board for which rates are levied” shall be qualified to be a member of the council of any municipal corporation.

The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organized, and paid over the rates levied on the section to the board of an adjoining section, which provided accommodation for the school children living within the first-named section.

*Held*, a school board for which rates are levied, within the meaning of the amendment.

*Held*, also, following *Regina ex rel. Rollo v. Beard*, 3 P. R. 357, and *Regina ex rel. Adamson v. Boyd*, 4 P. R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling.

No objection to the respondent’s qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths, warning the electors not to vote for the respondent.

*Held*, not sufficient to entitle the relator to the seat.

*W. M. German*, K.C., for the relator.

*L. C. Raymond*, for the respondent.

[McMAHON, J., 14TH APRIL, 1908.]

## BANK OF MONTREAL v. LINGHAM.

*Limitation of actions—Simple contract debt—Conversion into specialty debt  
—Evidence of—Deed.*

Default having been made in the payment of two promissory notes held by a bank, a trust deed was executed in 1884, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed recited the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor; and the father thereby conveyed the same to the trustee as security in the first place for the indebtedness of defendant to his father, then for that to the bank, power being given to the trustee to sell the said lands on one month's default in payment and on notice in writing by the trustee of his intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay same. In 1893, written notice having been given by the trustee of his intention to sell, a deed of release of all his interest in the said lands was given by the defendant to the bank, the deed reciting that it was made to save the expense of a sale.

*Held*, that neither the trust deed nor the deed of release converted the debt into a specialty debt, and so the defendant could validly set up the Statute of Limitations as a bar to an action brought in 1902.

W. Cassels, K.C., and A. W. Anglin, for the plaintiffs.

C. H. Ritchie, K.C., and W. B. Northrup, K.C., for the defendant.

[STREET, J., 3RD MARCH, 1908.]

## CITY OF TORONTO v. CONSUMERS' GAS CO. OF TORONTO.

*Company—Toronto Gas Company—Increase of capital—Statutory restrictions—Payments to directors—Dividends—Reserve fund—Investment in business—Plant and buildings renewal fund—Reduction in price of gas—Audit by municipality—Charges for depreciation or loss—Construction of statute.*

By 50 V. c. 85 (O.), "An Act to further extend the powers of the Consumers' Gas Company of Toronto," the defend-

ants were given authority to increase their capital stock to \$2,000,000.

By s. 4 it was provided that the new stock should be sold, and that all surplus realized over the par value of the shares should be added to the reserve fund until it should be equal to one-half of the paid-up capital stock, the true intent and meaning being that the defendants might at all times have a reserve fund equal to but not exceeding one-half of the then paid-up capital, which fund might be invested in specified securities.

By s. 6 it was enacted that there should be created and maintained by the defendants a plant and buildings renewal fund, to which should be placed each year five per cent. on the value at which the plant and buildings in use by the defendants stood in their books at the end of their then fiscal year, and that all usual and ordinary repairs and renewals should be charged against this fund.

By s. 7, any surplus of net profit remaining at the close of any fiscal year, after payment of, (1) fees to the directors not exceeding \$9,000 per annum, (2) a dividend at 10 per cent. on the paid-up capital, (3) the establishment and maintenance of the reserve fund, and (4) providing for the plant and buildings renewal fund, was to be carried to a special surplus account; and whenever the amount of such surplus should be equal to five cents per 1,000 cubic feet on the quantity of gas sold during the preceding year, the price of gas should be reduced for the current year at least five cents per 1,000 cubic feet.

By s. 8, if in any year the net profits should not be sufficient to meet the requirements of the defendants for the payment of fees, dividends, and provision for the plant and buildings fund (as in s. 7), the directors were empowered, in their discretion, to draw upon the reserve fund to the extent of such deficiency, and to restore from earnings any amount so drawn, but it was provided that the reserve fund should not otherwise be drawn upon.

By s. 9, the plaintiffs were authorized to be parties to the annual audit of the defendants' affairs.

*Held*, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their other property, and invested in the securities mentioned in s. 4, but were at liberty to use it in their business,

as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of the defendants' property which it had helped to acquire while invested in the business.

2. That charges for decrease in the value of gas mains, for iron gas lamps which became useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within s. 6 so as to be chargeable to the plant and buildings renewal fund.

3. That under s. 6 the defendants were entitled to continue to contribute to the plant and buildings renewal fund the five per cent. authorized, even although it should not appear necessary to do so for the purposes for which the fund was to be used.

These sections were construed in *Johnston v. Consumers' Gas Co.*, 27 O. R. 9, upon a special case, but the decision was reversed (23 A. R. 566, [1898] A. C. 477), although not on the question of construction.

*Held*, that the Court was not bound by the views expressed in that case.

*E. F. B. Johnston*, K.C., and *A. F. Lobb*, for the plaintiffs.

*S. H. Blake*, K.C., *A. B. Aylesworth*, K.C., and *A. M. Stewart*, for the defendants.

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[BRITTON, J., 23RD MARCH, 1903.]

## BRADBURN v. EDINBURGH LIFE ASSURANCE CO.

*Constitutional law—Powers of Dominion Parliament—R. S. C. c. 127, s. 7—Interest—Rate of—Mortgage—Redemption—British insurance company lending money in Canada—Contract—Application of law of Canada—Tender of mortgage money—Agents in Canada—Bill of exchange.*

In an action to compel the defendants, mortgagees in Great Britain, to accept the principal money and interest due on a ten-year mortgage, which had run for six and one-half years, under the provision of R. S. C. c. 127, s. 7, in which it was contended that that section was *ultra vires* of the Dominion Parliament, and that the tender was not made to the proper agents:—

*Held*, that the section was *intra vires* of the Dominion Parliament, and it was not restricted in its application to such mortgages as are mentioned in s. 3 of the Act, but applies to every mortgage on real estate executed after the 1st July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage."

*Held*, also, that the words of s. 25 of R. S. O. 1897 c. 205 are wide enough to apply to mortgages executed prior to the passing of that Act.

*Held*, also, that defendants' Imperial Act of incorporation gave them the right to lend money in Canada in the same way as an individual could do, but gave them no higher or other rights.

*Held*, also, that the loan being made, the property situated, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents.

*Held*, also, that the agency of the persons to whom the tender was made was established, and that the tender of a bill of exchange was sufficient under the terms of the mortgage.

And judgment was given that no further interest should be chargeable, payable, or recoverable.

A. P. Poussette, KC., for the plaintiff.

F. W. Kingstone and D. T. Symons, for the defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Minister of Justice of Canada was notified, but was not represented.

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#### IN CHAMBERS.

[Boyd, C., 27<sup>TH</sup> MARCH, 1903.]

✓ HALLIDAY v. RUTHERFORD.

*Costs—Scale of—Action in High Court—Payment of \$300 into Court—Inquiry as to creditors' claims—Certificate for County Court costs—Refusal of set-off—Discretion.*

Under 59 V. c. 19, s. 3 (O.), the equitable jurisdiction of the County Courts, which had been taken away by the Law



Reform Act of 1868, was restored to that Court, so that it has equitable jurisdiction where the subject matter involved does not exceed \$200.

An action having been brought to set aside an alleged fraudulent conveyance of certain lands to the defendant, a *lis pendens* was registered, and by a consent order was vacated on payment of \$300 into Court, with a provision that creditors should file their claims. Claims were filed to over \$200, adjudicated upon by the Master, and fixed at \$189.47, the amount found to be due to the plaintiff being \$96.20, for which judgment was given with costs on the lower scale; the Master giving a certificate that his ruling was that the plaintiff was entitled to costs on the County Court scale, without any right of set-off.

*Held*, that the Master's order as to costs should not be interfered with.

*John MacGregor*, for the defendant.

*F. C. Cooke*, for the plaintiff.

[FALCONBRIDGE, C.J., 21ST MARCH, 1908.]

✓ REX *ex rel.* McLEOD v. BATHURST.

*Municipal elections—Irregularity—Quo warranto application—Status of relator—Voting for respondent—Disclaimer.*

The relator attacked the election of the respondents as county councillors for non-compliance with certain statutory formalities:—

*Held*, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was *nihil ad rem*.

*I. F. Hellmuth*, K.C., for the relator.

*D. B. Maclellan*, K.C., for the respondents.

[BRITTON, J., 27TH APRIL, 1903.]

## ✓ CANADIAN BANK OF COMMERCE v. TENNANT.

*Writ of summons—Renewal of—Grounds for—Sufficiency of—Statute of Limitations.*

An *ex parte* order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence having been made, it was shewn on a motion to set aside such order that the defendant had never changed his place of residence, and that it could readily be ascertained from the directory:—

*Held*, that the order should not be set aside, the local Master who made the *ex parte* order having been satisfied as to the efforts made to effect such service, and nothing having been withheld from him; despite the fact that, but for the existence of the writ, the ordinary period of limitation would have expired.

*Howland v. Dominion Bank*, 15 P. R. 56, and *Mair v. Cameron*, 18 P. R. 484, distinguished.

Order of Master in Chambers of 30th March, 1903, affirmed.

*D. L. McCarthy*, for the plaintiffs.

*J. H. Tennant*, for the defendant.

[THE MASTER IN CHAMBERS, 6TH APRIL, 1903.]

✓ REX *ex rel.* O'DONNELL v. BROOMFIELD.

*Municipal elections—County councillor—Disqualification—Membership in school board “for which rates levied” — Statutes—Saving clause—Resignation before taking office—Relator claiming seat—Necessity for notice at nomination—Costs of quo warranto application.*

In a *quo warranto* proceeding in which it was sought to unseat the respondent as a county councillor because he was a member of a school board for which rates were levied, and to seat the relator:—

*Held*, that the relator was not entitled to the seat, as he had not objected to the disqualification of the respondent

at the nomination or given any notice on the election day to the electors that they were throwing away their votes on account of the respondent's disqualification.

*Held*, also, that s. 76 of the Municipal Act does not apply to county councillors.

*Held*, also, that at the time of the respondent's election he was a member of a school board for which rates were levied, and if he were then disqualified, his resignation after his election and before taking his seat would not remove his disqualification. *Regina ex rel. Rollo v. Beard*, 3 P. R. 357, followed.

*Held*, also, that the words "for which rates are levied" used in 2 Edw. VII. c. 29, s. 5 (O.), disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates are levied, whether levied by the municipal corporation for which he was elected or by any other.

*Held*, also, that the saving clause in s. 5 refers to the election of the member of the council of any municipal corporation, and not to the election of a school trustee. *Rex ex rel. Zimmerman v. Steele*, ante p. 196, followed.

*Held*, therefore, that at the time of his election as county councillor the respondent was disqualified; and a new election was ordered.

The relator was allowed the costs of the proceedings so far as he had succeeded, and the respondent his costs of opposing the application to seat the relator; such costs to be set off *pro tanto*.

*J. A. McGillvray*, K.C., for the relator.

*J. E. Farewell*, K.C., for the respondent.

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#### REX *ex rel.* ROBINSON v. McCARTY.

*Municipal elections—Township councillor—Disqualification—Membership in school board "for which rates are levied"—Resignation—Non-acceptance—Designation of board—Relator's claim to seat—Notice to electors—Costs—Status of relator—Discretion.*

*Held*, that the respondent being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been

accepted by his co-trustees, was, by 2 Edw. VII. c. 29, s. 5 (O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a "board of public school trustees of union section," etc., or a "public school board."

The respondent's qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat.

*Rex ex rel. Steele v. Zimmerman*, ante p 196, followed.

It appearing to be the fact, but there being no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while the election was set aside and a new election ordered, no costs were given to either party.

*J. P. Mabee*, K.C., for the relator.

*A. B. Aylesworth*, K.C., for the respondent.

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[11TH APRIL, 1903.]

### SMITH v. McDEARMOTT.

*Discovery—Examination of party—Action for equitable execution of judgment—Right to attack judgment—Absence of fraud and collusion.*

In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution, of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon.

A motion that a witness who, on examination for discovery, had refused to answer questions relating to such circumstances, should be compelled to attend and be examined at his own expense, was therefore refused.

*W. D. Gwynne*, for the defendant Lee.

*W. N. Ferguson*, for the plaintiff.

## NOVA SCOTIA.

—  
In the Supreme Court.

IN CHAMBERS.

[TOWNSHEND, J., 10TH MAY, 1908.]

MANLEY v. GREAT WEST LIFE ASSURANCE CO.

*Writ of summons—Service of notice out of jurisdiction—Company defendant.*

The defendant company were incorporated by Act of the Parliament of Canada, and had their head office at Winnipeg. The plaintiffs obtained *ex parte* an order giving them leave to issue a writ of summons against the defendant company and to serve a notice of the same upon the company in Winnipeg. The notice having been served, the defendant company moved to set aside the service as irregular.

*McInnes*, for the defendants.*Notting*, for the plaintiffs.

TOWNSHEND, J., held that Order XI., Rule 4, did not apply. The defendant company were not a foreign company, and therefore the writ and not a notice thereof should have been served. The service of the notice was set aside with costs.

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BRITISH COLUMBIA.—  
In the Supreme Court.

[FULL COURT, 27TH JANUARY, 1908.]

ROBITAILLE v. MASON.

*Malicious prosecution—County Courts Act, ss. 23, 31—Waiver of objection to jurisdiction—False imprisonment—Interference by complainant.*

The plaintiff took possession of the defendant Mason's float, which he found adrift on a lake. Mason, although

aware that the plaintiff claimed a lien for salvage, made no move towards recovering the float until after three weeks, when he, in company with a constable, demanded it, and on the plaintiff refusing to give it up without compensation, he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under s. 338 of the Code for taking and holding timber found adrift, was dismissed. Mason provided the tug which got the float and carried the plaintiff to gaol, and accompanied the constable with the plaintiff to the gaol.

*Held*, on the facts, affirming the judgment of FORIN, Co. J., that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment.

An action for malicious prosecution was tried in a County Court, which has no jurisdiction to try such an action unless a signed agreement consenting thereto is entered into by the parties. No signed agreement was shewn, but the action was tried without objection by either party, and judgment given in favour of the plaintiff.

*Held*, that the question of the jurisdiction of the County Court could not be raised on appeal.

*W. A. Macdonald*, K.C., for the appellant.

*S. S. Taylor*, K.C., for the respondent.

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[FULL COURT, 9TH APRIL, 1903.]

## NIGHTINGALE v. UNION COLLIERY OF BRITISH COLUMBIA.

*Railway—Injury to person—Negligence—Passenger—Mere licensee—Duty of company—Verdict—No evidence to support—Setting aside.*

Action by the widow and administratrix of Richard Nightingale for compensation for his death caused while travelling on the defendants' railway, by reason of the train falling through a bridge.

Nightingale had a contract with the defendant company to repair a bridge, and, while riding on the locomotive of the company's coal train on his way to the work, he was killed by reason of the train falling through the bridge. The engine driver in charge of the train (there being no conductor) had no authority to take passengers, and had in-

structions not to allow persons to travel on the engine without permission from some competent authority, but the company's officers and servants and other persons authorized by the manager and master mechanic used to ride on the coal train.

A few days before the accident Nightingale and the defendants' manager had gone down to the bridge on the engine of a coal train and returned the same way the same day.

In an action by Nightingale's representatives to recover damages from the company for his death, the jury held that the company had undertaken to carry Nightingale as a passenger:—

*Held*, on appeal, setting aside judgment in plaintiff's favour, that there was no evidence to support such a finding, and that Nightingale was a "mere licensee."

The relation of common carrier and passenger does not exist when a person travels on the locomotive of a coal train without the permission of some officer who has authority to give such permission, and, if injured, such a person has no right of action unless injured through the *dolus* as distinguished from the *culpa* of the carrier.

*Per* HUNTER, C.J.—The power which a Judge has to take a case away from the jury should be exercised only when it is clear that the plaintiff could not hold a verdict in his favour: if the matter is reasonably open to doubt the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported.

*A. P. Luxton*, for the defendants.

*D. G. Macdonell*, for the plaintiff.

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### IN CHAMBERS.

[HUNTER, C.J., 5TH MARCH, 1903.]

REX v. McCORMACK.

*Vagrancy—Information for—Facts necessary to be stated.*

Application for *habeas corpus*. The accused was charged with being a "loose, idle person, or vagrant," and was convicted by the police magistrate for Vancouver, and sentenced

to six months' imprisonment with hard labour. The conviction described the offence in the same terms as the information.

*Held*, that the conviction was bad in that it did not set out the facts constituting the offence.

Under s. 207 of the Code various acts constituting vagrancy are specified, and an information charging vagrancy should shew the particular facts on which the prosecution relies to establish the offence.

*A. D. Taylor*, for the applicant.

*T. R. E. McInnes*, contra.



## Supreme Court of Canada.

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STATED CASE.]

[29TH APRIL AND 8TH JUNE, 1903.

### In re REPRESENTATION IN HOUSE OF COMMONS.

*Constitutional law—House of Commons—Representation of Provinces—B. N. A. Act, 1867, s. 51—Aggregate population of Canada.*

In determining the number of representatives to which Ontario, Nova Scotia, and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in s.-s. 4 of s. 51 of the B. N. A. Act, 1867, mean the whole population of Canada, including that of Provinces which have been admitted subsequent to the passing of the Act. Prince Edward Island on admission to the union became subject to the provisions of s. 51, and its representation is liable to be readjusted thereunder after each census.

*Æmilius Irving*, K.C., for Ontario.

*Pugsley*, K.C., A.-G., and *Allen*, K.C., for New Brunswick.

*Longley*, K.C., A.-G., and *McDonald*, for Nova Scotia.

*Cannon*, K.C., for Quebec.

*C. Fitzpatrick*, K.C., A.-G., and *Newcombe*, K.C., for the Dominion.

*Peters*, K.C., A.-G., *A. B. Aylesworth*, K.C., and *Williams*, for Prince Edward Island.

ONTARIO.]

[5TH MAY, 1903.

MONTREAL AND OTTAWA R. W. CO. v. CITY OF OTTAWA.

CANADA ATLANTIC R. W. CO. v. CITY OF OTTAWA.

*Railway—Highway crossing—Compensation to municipality—Terminus "at or near" point named.*

Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without

liability to compensate the municipalities for the portions of the highways taken for the road.

A charter authorized the construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the counties of Vaudreuil, Prescott, and Russell.

*Held*, that, if it were necessary, the railway could pass through Carleton county, though it was not named.

*Held*, also, that in this Act the words "at or near the city of Ottawa" meant "in or near" said city.

Judgment of the Court of Appeal, 4 O. L. R. 56, 22 Occ. N. 24, affirming the judgment at the trial, 2 O. L. R. 336, affirmed.

A. B. Aylesworth, K.C., and T. McVeity, for the appellants.

F. H. Chrysler, K.C., for the Canada Atlantic Railway Company.

W. Nesbitt, K.C., and W. H. Curle, for the Montreal and Ottawa Railway Company.

QUEBEC.] 4

[20TH APRIL, 1908.

### GOSSELIN v. THE KING.

*Criminal law—Canada Evidence Act, 1893—Husband and wife—Competency of witness—"Communication"—Construction of statute—Privilege—Directions by legal adviser—Practice—Reference to Hansard debates—Method of interpretation.*

Under the provisions of the Canada Evidence Act, 1893, the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify; MILLS, J., dissenting.

Evidence by the wife of the person accused, of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify; MILLS, J., dissenting.

*Per* GIROUARD, J. (dissenting):—The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo*, *de facto*, or *de corpore*. Sexual intercourse is such a communication, and in the case under appeal neither the evidence by the accused that blood-stains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony

of his wife in contradiction of such statement as to her condition, ought to have been received.

*Per* MILLS, J. (dissenting):—Under the provisions of the Canada Evidence Act, 1893, and its amendments, the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.

*Per* TASCHEREAU, C.J.:—The report of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute.

Judgment of the Court below affirmed.

*Gibson* and *E. Roy*, for the appellant.

*Cannon*, K.C., for the Crown.

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[29TH APRIL, 1908.]

ST. LAURENT v. MERCIER.

*Mining law—Overlapping claim—Renewal of application—Re-staking.*

In August, 1889, M. staked and received a grant for a placer claim, which included part of an existing creek claim, staked previously by W. In 1900 M. applied for and obtained a renewal of his license, embracing the identical ground staked by him in the previous year, and, at the time such renewal was applied for, W.'s creek claim had lapsed. In March, 1901, S. staked a bench claim, embracing the lands in W.'s expired location, which had been overlapped by M.'s claim, as being unoccupied Crown land.

*Held*, affirming the judgment appealed from, DAVIES and ARMOUR, JJ., dissenting, that, although M.'s original staking of the ground in dispute was invalid, yet, as W.'s claim had lapsed at the time of the application for a renewal grant in 1900, M. having been continuously in possession of the whole location as staked by him, his stakes still standing and the limits of his area well known, his application for the renewal gave him a valid entry without the formalities of re-staking and applying anew for the original area located by him, and, following the rule laid down in *Osborne v. Morgan*, 13 App. Cas. 227, S. could not interfere with M.'s possession.

*J. Lorne McDougall*, for the appellant.

*J. A. Ritchie*, for the respondent.

NOVA SCOTIA.] J

[5TH MAY, 1903.]

## LOVITT v. ATTORNEY-GENERAL FOR NOVA SCOTIA.

*Succession duties—Property exempt—Sale under will—Duty on proceeds.*

Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local, or municipal purposes" in the Province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate.

*Held*, affirming the judgment appealed against, 35 N. S. Rep. 223, SEDGEWICK and MILLS, JJ., dissenting, that, although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale, when passing to legatees, were.

W. A. B. Ritchie, K.C., for the appellant.

A. A. Mackay, for the respondent.

J [2ND JUNE, 1903.]

## BENTLEY v. PAPPARD.

*Title to land—Possession—Statute of limitations.*

In 1822 M. obtained a grant of land from the Crown, and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years, when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons, who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed of this land to B., who proceeded to cut timber from it. In an action of trespass by P.:—

*Held*, that the jury at the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870, and that his possession had ripened into a title. If not, the deed to his sons in

1870 gave them exclusive possession, and, if they had not a perfect title then, they had twenty years after, in 1890.

Judgment of the Court below affirmed.

*Roscoe*, K.C., for the appellant.

*Borden*, K.C., and *Gourley*, K.C., for the respondent.

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### PORTER v. PELTON.

*Contract under seal—Undisclosed principal—Partnership—Amendment.*

P. sold mining areas, and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company, which received a deed of the land and did some work, but finally ceased operations. Only a small part of the stock was sold, and none was given to P., who brought an action against the purchaser, H., in which he alleged that the latter was a partner of the purchaser and that the agreement was signed on behalf of both. The purchaser did not defend the action.

*Held*, that no action could lie against H. on the agreement under seal not signed by him, even if it was for his benefit and a seal was not necessary.

The Court refused to interfere with the discretion of the Court below in refusing an amendment to the statement of claim.

Judgment of the Court below affirmed.

*Russell*, K.C., and *Wade*, K.C., for the appellant.

*Newcombe*, K.C., for the respondents.

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### Exchequer Court of Canada.

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[BURNBRIDGE, J., 6TH APRIL, 1908.]

### MACARTHUR v. THE KING.

### KEEFE v. THE KING.

*Crown—Public works—Injurious affection—Closing up street—Compensation.*

The properties of the suppliants were injuriously affected by the construction of a public work, which obstructed a high-

way upon which the properties, respectively, abutted. Mac-Arthur's property was 190 feet from the place of obstruction, and Keefe's 240 feet. The suppliants' properties, instead of being respectively situated, as they were formerly, on a main thoroughfare, were, by the change effected by the construction of the said public work, situated at the extreme end of a street closed up at one end, and forming a *cul de sac*.

*Held*, that where the injurious affection concerned the personal convenience of the occupiers of the properties in question, the suppliants were not entitled to compensation, but that in so far as the value of the properties, in the hands of any one, and used for any purpose to which they could be put, was lessened, the suppliants ought to recover therefor.

*D. B. Macleennan*, K.C., for the suppliants.

*F. H. Chrysler*, K.C., and *P. K. Halpin*, for the Crown.

[20TH APRIL, 1908.]

### DESROCHERS v. HAMBURG PACKET CO.

*Admiralty law—Shipping—Collision—Liability.*

Appeal from the Quebec Admiralty District.

In a collision in Canadian waters between the steamship W. and the schooner M. A., the W. was found to be at fault in a matter that occasioned the collision. It was also found that the M. A. had contravened the regulations for preventing collisions in Canadian waters; but that such contravention did not contribute to the accident. In an action against the W. by the widow and universal legatee of the owner of the M. A.:—

*Held*, that the W. was alone to blame, and that the plaintiff was entitled to recover.

2. Where a collision occurs on the High Seas, and the provisions of s. 419 of the Merchants Shipping Act, 1894, and the Imperial regulations for preventing collisions at sea, are in force, the obligation is imposed on a vessel that has infringed a regulation which is *prima facie* applicable to the case, to prove, not only that such infringement did not, but that it could not, by any possibility, have contributed to the accident; but when the collision occurs in Canadian waters, and the Act respecting the navigation of Canadian waters, R. S. C. c. 79, and the regulations for the prevention of collisions made by the Governor-General in Council, are in force,

the vessel which contravenes one of them will not be held to be in fault unless such contravention has contributed to the collision.

*The Cuba v. McMillan*, 26 S. C. R. 661, referred to.

*L. P. Pelletier*, K.C., *A. H. Cook*, K.C., and *F. Meredith*, K.C., for the appellants (defendants).

*C. A. Pentland*, K.C., and *A. R. Angers*, K.C., for the respondents (plaintiffs).

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

DIVISIONAL COURT.]

[14TH APRIL, 1908.]

EXCELSIOR LIFE INS. CO. v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

*In re* FAULKNER.

*Arbitration and award—Submission—Appointment of sole arbitrator—Arbitration Act, R. S. O. 1897 c. 62, s. 8—Appeal—Order of Judge in Chambers.*

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss. the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."

*Held*, reversing the decisions of a Divisional Court, 3 O. L. R. 93, 22 Occ. N. 94, and of STREET, J., 2 O. L. R. 301, 21 Occ. N. 532, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R. S. O. 1897 c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator.

*Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls*, 2 O. L. R. 585, 21 Occ. N. 595, approved.

*Held*, also, that the order of STREET, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as *persona designata*, but was a judicial order from which an appeal lay.

*J. H. Moss*, for the appellants.

*R. McKay* and *H. J. Fisher*, for the respondents.

DIVISIONAL COURT.]

[14TH APRIL, 1908.]

*In re* CARTWRIGHT PUBLIC SCHOOL TRUSTEES AND  
TOWNSHIP OF CARTWRIGHT.

*Public schools—Selection of school site—Trustees—Ratepayers—Difference—Award—Invalidity—Mandamus—Estoppel.*

By s. 31 of the Public Schools Act, R. S. O. 1897 c. 292, the trustees of every rural school section shall have power to select a site for a new school house or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected. By s.-s. 2, in case a majority of the ratepayers present at such special meeting differ as to the suitability of the site selected by the trustees, each party shall choose an arbitrator, etc.

*Held*, that it is only in case of a difference between the trustees, on the one hand, and a majority of the ratepayers at a special meeting, on the other, as to a school site *selected* by the trustees, that an arbitration is to be had.

And where a majority of the ratepayers at a special meeting voted in favour of a change of school site, without any selection of site having been first made by the trustees:—

*Held*, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner prescribed by s.-s. 2, whether such award was or was not valid on its face, was an absolutely void proceeding, and no answer to a motion by the trustees for a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house in pursuance of the vote of the ratepayers.

*Quære*, whether the award was valid on its face, inasmuch as it did not shew a difference between the trustees and the ratepayers.



*Held*, also, that there could be no estoppel against the applicants, or waiver of the public right.

Judgment of a Divisional Court, 4 O. L. R. 272, affirmed

A. B. Aylesworth, K.C., for the appellants.

W. R. Riddell, K.C., for the respondents.

Moss, C.J.O.]

[18TH MAY, 1909.]

UFFNER v. LEWIS (No. 2.)

BOYS' HOME v. LEWIS (No. 2)

*Will—Legacies — Overpayment of legatees under judgment — Mistake — Repayment—Interest—Distribution.*

A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay: (1) to a sister a legacy of \$500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of \$500; (3) to the children of another niece a legacy of \$500; and (4) to a charitable institution a legacy of \$500; with a direction that, should there not be sufficient to pay all the legacies, there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions."

*Held*, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each.

Judgment of Moss, C.J.O., affirmed.

Proceedings were taken in the year 1882 for the administration of the estate, and, without, as was held in the previous judgment of this Court, 27 A. R. 242, proper proceedings being taken, it was assumed that there were no children of the niece, and the amount of their legacy and their share in the residue was divided among the charitable institution, the trustees, and one of the other legatees.

*Held*, that the trustees and the charitable institution were bound to re-pay the excess which they had received; *per curiam*, with interest from the date of proceedings taken by the children of the niece; and *per MACLENNAN, J.A.*, dissent-

ing, with interest from the date of distribution under the report in the administration proceedings.

Judgment of Moss, C.J.O., reversed.

*D'Arcy Tate*, for the appellants.

*J. V. Teetzel*, K.C., and *A. M. Lewis*, for the respondents the Boys' Home.

*G. F. Shepley*, K.C., and *William Bell*, for the respondents Lewis and Morgan.

*F. W. Harcourt*, for the infant respondents.

Boyd, C.]

[14TH APRIL, 1908.

*In re* CANADIAN PACIFIC R. W. CO. AND CITY OF  
TORONTO.

*Landlord and tenant—Railway company—City lease—Usual covenants—Covenants to pay taxes and repair—Right of re-entry—Rent in arrear—Interest on.*

An agreement made between the corporation of the city of Toronto and the Canadian Pacific Railway Company, provided, amongst other things, for a lease renewable in perpetuity, in successive terms of fifty years, at an agreed rent, payable on named days, nothing being said about covenants.

*Held*, that the agreement was not self-contained, but that the execution of a formal lease was contemplated, which should contain the usual covenants, and that covenants to pay taxes, and for the right of re-entry for non-payment of rent or taxes, were, under the circumstances here, usual covenants.

Where, by the agreement, a time was fixed for the commencement of the lease, and the railway company entered into possession, and had the enjoyment of the demised premises, but the title was not settled until some time afterwards, interest on arrears of rent, which accrued due in the meantime, was allowed.

Decision of Boyd, C., 4 O. L. R. 134, 22 Occ. N. 235, reversed in part.

*E. D. Armour*, K.C., and *Angus MacMurchy*, for the railway company.

*C. Robinson*, K.C., and *J. S. Fullerton*, K.C., for the city of Toronto.

McDOUGALL, Co.J.]

[14TH APRIL, 1908.]

## REX v. KARN.

*Criminal law—Advertising medicine intended to prevent conception—Evidence to support conviction—Functions of judge and jury—Acquittal—New trial—Crown case reserved—Appeal.*

The defendant was tried upon an indictment for that he did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise, and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, contrary to the Criminal Code, s. 179 (c).

The evidence for the Crown shewed that the defendant conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets."

The Judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned.

*Held*, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception; and therefore it would have been right to have left the case to the jury; and a conviction might have been supported.

It is for the Judge to determine whether a document is capable of bearing the meaning assigned to it, and for the jury to say whether, under the circumstances, it has that meaning or not.

The Court declined to direct a new trial.

*Per OSLER, J.A.* :—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case.

*J. R. Cartwright, K.C., for the Crown.*

*E. E. A. DuVernet, for the defendant.*

McDOUGALL, Co.J.]

[14TH APRIL, 1908.

### REX v. WOODS.

*Criminal law—Bigamy—Defence—Dissolution of former marriage—Decree of Foreign Court—Validity—Domicile.*

Upon an indictment of the defendant for bigamy the defence was, that she had been divorced from her husband by the decree of a foreign Court.

*Held*, that the marriage being a Canadian one, and the domicile of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed.

*Magurn v. Magurn*, 3 O. R. 570, 11 A. R. 178, and *Lemesurier v. Lemesurier*, [1895] A. C. 517, followed.

*Per OSLER, J.A.*—The Court of Appeal should not be asked, by a reserved case, to solve questions on which the validity of a conviction does not necessarily depend.

*T. C. Robinette, K.C., for the prisoner.*

*J. R. Cartwright, K.C., for the Crown.*

MORGAN, JUN. Co.J.]

[14TH APRIL, 1908.

### REX v. JAMES.

*Criminal law—Keeping common gaming house—"Gain"—Payment for refreshments—Profit—Misdirection—Acquittal of defendant—Crown case reserved—New trial.*

The defendant was indicted for keeping a common gaming house, contrary to ss. 196 (a) and 198 of the Criminal Code. The former defines a common gaming house as a house, room, or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing "poker." Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play.

*Held*, that "gain" may be derived indirectly as well as directly; that by what the defendant allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players.

The direction of the Judge at the trial to the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved for the Crown, but the Court declined to order a new trial.

*Per OSLER, J.A.*:—A case should not be reserved at the instance of the prosecutor after an acquittal.

*J. R. Cartwright, K.C.*, for the Crown.

*T. C. Robinette, K.C.*, for the defendant.

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## HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 18TH APRIL, 1908.]

### BERRY v. DAYS.

*Covenant—Restraint of trade—Breach—Injunction—Damages—Waiver—Assignment of covenant.*

The defendant covenanted with the plaintiff that he would not directly or indirectly engage in the drug business in a certain village, or within a radius of ten miles therefrom,

during a term of five years, and that he would not open or have part in a third or further drug store during a term of five years. The plaintiff sold his share in the drug business to the defendant, and actively promoted a partnership between him and his (the plaintiff's) son, which was continued for some months, when the defendant sold out to the son.

The plaintiff afterwards acquired the business and sold it to his co-plaintiff, by bill of sale, reciting the covenant, and extended its benefit to the purchaser, and covenanted with him to save him harmless from a breach of the covenant by the defendant.

In an action to restrain the defendant from carrying on a third drug store which he had opened:—

*Held*, that for the first five years there were two concurrent severable covenants, and that while the plaintiff might by his conduct have waived a breach of the first, not to enter into business during the five years, he had not waived any breach of the second, not to open or have part in a third store.

*Held*, also, that the covenant was assignable, and that the right to enforce it did not terminate by reason of the plaintiff having gone out of business; and an injunction was granted restraining the defendant from opening, carrying on, or having part in, a third store for the ten years.

Judgment of MACMAHON, J., 1 O. W. R. 809, affirmed.

*John A. Paterson*, K.C., for the defendant.

*W. Proudfoot*, K.C., for the plaintiffs.

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[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 18TH MAY, 1908.]

### HEFFERNAN v. TOWN OF WALKERTON.

*Municipal corporations—By-law—Payment to mayor—Procedure at meeting of council—Reference to committee of whole—Injunction—Discretion.*

The mayor of a town had a member of the town council removed from the council chamber for disorderly conduct. The councillor brought an action against the mayor, which was tried and dismissed with costs, which costs the mayor was unable to collect.

The council, with a view to provide the mayor with funds to pay the costs, in June introduced a by-law for \$125 "to remunerate the mayor for the present year." In September the council, in passing the estimates, included an item of

\$300 for "law costs, etc.," which the defendants said was known to be intended to cover the \$125, but the plaintiff denied this. In December a resolution was passed that the by-law be read a second and third time, passed, signed, and sealed. The by-law was not submitted to a committee of the whole council, to which the plaintiff objected at the time, although it was submitted to the finance committee, who reported "that funds for the same be provided from the general funds," which report was adopted by the council, and the by-law was read a third time and ordered to be signed and sealed, the vote being four for the by-law and two against it, the mayor presiding and ruling on the objection that there was not a two-thirds vote in favour of the resolution (out of the seven present, of whom he was one), but not voting. The by-law was signed, and it was sealed next morning, and a cheque issued to the mayor.

The council had, under s. 326 of the Municipal Act, previously passed a by-law to regulate their proceedings, which provided that any appropriation of money amounting to \$25 should be submitted to a committee of the whole; that after the passing of the estimates any by-law proposing an expenditure of money should receive a two-thirds vote of the members present; and that any member present who was interested should not vote.

In an action for an injunction to restrain the council from remunerating the mayor and to prevent payment of the \$125:—

*Held*, STREET, J., dissenting, that the plaintiff had no merits; that the case was not one in which it was just or convenient that an injunction should be granted; that the by-law was as fully considered by the council and the same members as if considered in committee of the whole; that the money was on hand, and the council desired that it should be paid; that there was no evidence that the ratepayers were objecting to the payment; that the plaintiff was hostile to the mayor, and should not be allowed to thwart the will of the council on account of a slip; that, if there is any case in which there is any discretionary power in the Court, this was one; that the action was not brought in the interest of the ratepayers, but as a personal matter; and, in the exercise of discretion and under the circumstances, the appeal was dismissed.

Judgment of *BOYD, C.*, 2 O. W. R. 17, affirmed.

*Per* STREET, J.:—The mayor being precluded from voting as being interested, his being present in the room made

no difference, and the vote of four against two was a two-thirds vote; but the \$125 appropriation for the mayor was not included in the \$300 appropriation for "law costs, etc.," in the estimates; and the provisions of the by-law regulating proceedings were binding upon the council, and could be insisted on by any member, and a by-law passed in disregard of its provisions and of the protest of a minority, should not be supported when it is promptly attacked.

*J. E. Jones*, for the plaintiff.

*A. Shaw, K.C.*, for the defendants.

[BOYD, C., MACLAREN, J.A., FERGUSON, J., 7TH APRIL, 1908.

### KAVANAUGH v. CASSIDY.

*Security for costs—Residence out of Ontario—Rule 1198 (b).*

A man of about thirty-six years of age, who had since childhood lived in the United States, came to Toronto in October, 1902, to inspect for his employers, brokers in New York, a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks, and he then was employed as a telegraph operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with that business the plaintiff was accused by the defendant of fraud, and arrested, this action for damages being brought in consequence thereof. He was an unmarried man, and had been in the habit of living with his mother in Kansas City when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there.

*Held*, that under these circumstances the defendant was entitled to security for costs of the action.

*J. E. Cook*, for the defendant.

*S. B. Woods*, for the plaintiff.

[BOYD, C., FERGUSON, J., MACMAHON, J., 11TH JUNE, 1908.

### *In re* TAGGART v. BENNETT.

*County Court appeal—Right of appeal—Order refusing to vary minutes of judgment—Duty of Judge to certify proceedings—Set-off of costs.*

An order of a County Court Judge in an action in a County Court dismissing an application to vary minutes



under Con. Rule 625 (2) is an interlocutory and not a final order; and no appeal lies from it to the High Court.

*Semble, per* BRITTON, J., in Chambers, that the fact that there may be no appeal from such an order is no reason why the Judge should not certify the papers; the question whether or not there is an appeal from such an order is for the Court appealed to, and such certificate should as a rule be given upon request; the Judge's duty being ministerial only.

*Semble, also*, that the setting off of costs (which was the matter in question on the motion to vary the minutes) is no part of what is ordinarily understood as settling minutes of judgment.

A motion for a mandamus to the Judge to certify the proceedings was dismissed by BRITTON, J., and the dismissal was affirmed by the Court.

*W. H. Bartram*, for the plaintiff.

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[BOYD, C., 24TH MARCH, 1908.]

### McMAHON v. COYLE.

*Landlord and tenant—Breach of covenant in lease—Assignment without leave—Re-entry for—Formal execution of deed of assignment after action.*

The right of re-entry under the short form of lease applies to the breach of a negative as well as an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave.

*Toronto General Hospital Trustees v. Denham*, 31 C. P. 203, followed.

The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant, so that the fact of the document shewing the transfer not having been executed until after action brought, is immaterial.

*E. G. Porter*, for the plaintiff.

*R. C. Clute*, K.C., and *W. S. Morden*, for the defendant.

[MEREDITH, J., 14TH APRIL, 1908.]

**ST. MARY'S CREAMERY CO. v. GRAND TRUNK R.W. CO.**

*Railway—Carriage of goods—Injury to goods by negligence—Shipping bill—Bill of lading—Condition requiring insurance—Breach of—Condition limiting liability.*

Under s. 246 of the Railway Act, a railway company are precluded from setting up a condition indorsed on a bill of lading relieving the company from liability for damages sustained to goods while in transit, where the damage is occasioned through negligence.

Where, therefore, a condition of a bill of lading given by a railway company on a shipment of goods, required the consignor to effect an insurance thereon, which in case of loss or damage to the goods, the company were to have the benefit of :—

*Held*, that the company were precluded from setting up the breach of such a covenant as a ground for relief from liability, when the damage to the goods had been occasioned through negligence.

*J. Idington, K.C., and L. Harstone, for the plaintiffs.*

*Walter Cassels, K.C., and Forster, for the defendants.*

[BRITTON, J., 9TH APRIL, 1908.]

**CAREW v. GRAND TRUNK R. W. CO.**

*Railway—Farm crossing—Obligation to provide—Dominion Railway Act—Midland Railway Company—Ontario statutes.*

The plaintiff's father in 1882 conveyed part of his farm to the Midland Railway Company, who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1900 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company.

*Held*, that the plaintiff could not compel the defendants, who had acquired the Midland Railway in 1893, to provide a farm crossing, either by virtue of the Dominion Railway Act or of Ontario legislation applicable to the railway before 1893.

Review of the statutes affecting the Midland Railway Company.

*Ontario Lands and Oil Co. v. Canada Southern R. W. Co.*,  
1 O. L. R. 215, 21 Occ. N. 188, followed.

K. Ruddy, for the plaintiff.

W. R. Riddell, K.C., for the defendants

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[BRITTON, J., 11TH MAY, 1908.]

*In re* ONTARIO POWER CO. OF NIAGARA FALLS AND  
HENSON.

*Constitutional law — Powers of Dominion Parliament — Incorporation of company—" Works for the general benefit of Canada "—Objects of company—Recital in Preamble—Construction of Act — Expropriation of land.*

A company was incorporated by a Dominion statute, which recited that "it is desirable for the general advantage of Canada that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland rivers, with the object of promoting manufacturing industries and inducing the establishment of manufactories in Canada, and other businesses," and that the contemplated works would interfere with the navigation of the Welland river.

The Act gave power to the company "to construct . . . and operate a canal and hydraulic tunnel from a point in the Welland river to a point in the Niagara river; to contract with any bridge company having a bridge across the Niagara river to carry wires across and connect them with any electric light or other company in the United States; and made certain sections of the Railway Act (then R. S. C. c. 109) applicable to the same as if specially set out, as well as R. S. C. c. 92, relating to works in navigable waters.

*Held*, that, considering the object of the Act, the subject matter dealt with, and how the corporate powers were to be exercised, it was not necessary that there should be an express declaration by the Parliament of Canada that the works were for the general advantage of Canada.

But *held*, also, that, even if it were necessary that there should be such a declaration, the preamble in the Act stating that it was for the general advantage of Canada, that the natural water supply of the Niagara and Welland rivers should be utilized for factories and "businesses" in Canada, that a company should be formed to utilize that water, and the company being created, the works so to be made were

declared to be for the general advantage of Canada—the preamble shewed the intention of Parliament to give the power, the reason why; and that reason is a parliamentary declaration.

*Held* also, that the Act giving the company the powers of a railway company gave the power to expropriate lands.

Subsequent legislation considered.

*Walter Cassels*, K.C., and *F. W. Hill*, for the company.

*H. S. Osler*, K.C., for the landowner.

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### IN CHAMBERS.

[STREET, J., 8TH APRIL, 1903.]

### REX v. FOSTER.

*Criminal law—Conviction under Ontario Liquor Act, 1902—Renewal of proceedings by certiorari—Subsequent issue of commitment—Invalidity—Amendment—Application of statute relating to justices of the peace—Irregularities—Name of informant—Name of defendant—Sentence—Adjudication—Fine.*

The defendant was convicted on the 3rd February, 1903, before a Judge designated under s. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of \$400. On the same day a warrant was issued by the Judge committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of certiorari was issued to the Judge and a County Crown attorney commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant.

*Held*, that the proceedings against the defendant were removed from the Court below by the issue and service of the certiorari, and that the subsequent proceedings were void.

By 2 Edw. VII. c. 12, s. 15 (O.), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under Provincial Acts.

*Held*, not to apply to proceedings under the Liquor Act, 1902.

*Semble*, that, in a conviction of this kind, it was no objection, on *habeas corpus*, that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forster."

*Semble*, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable.

*J. W. McCullough*, for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

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[BRITTON, J., 4TH MAY, 1908.]

### KINGSTON v. SALVATION ARMY.

*Parties—Unincorporated voluntary association—Service of process on religious body.*

The Salvation Army, the duly appointed officers of which are entitled under R. S. O. 1897 c. 162, to solemnize marriages, and which, under R. S. O. 1897 c. 307, may hold property in Ontario, may be sued in the Courts of Ontario.

*A. E. Hoskin*, for the defendants.

*D'Arcy Tate*, for the plaintiff.

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[BRITTON, J., 4TH MAY, 1908.]

### EMPIRE LOAN AND SAVINGS CO. v. McRAE.

*Specific performance—Contract for purchase of land—Judgment for payment of price—Extension of time—Payment on account—Liquidated damages—Forfeiture—Relief against.*

After judgment in an action by the vendors of land for specific performance, and before issue of the same, the vendors agreed to extend the time for the payment of the purchase money for three months, upon the terms of the purchaser paying down \$500; which extension was embodied

in the judgment, and it was agreed between the parties as follows: "If the defendant shall pay the balance of the purchase money within the time limited by the judgment, the plaintiffs shall give credit to the defendant upon the said balance for the said sum of \$500, but, if the defendant shall fail to make payment of the said balance within the time limited by the said judgment, then the plaintiff shall not be bound to give credit to the defendant upon the said balance for the said sum of \$500, and in this respect time shall be of the essence of the contract."

A few days after the expiry of the time limited by the judgment, the defendant tendered the purchase money, less \$500, which the plaintiffs refused to accept.

*Held*, that the above provision was in the nature of a forfeiture, and not of liquidated damages, and the purchaser was entitled to be relieved from the terms of the judgment and to have a conveyance of the property upon paying the balance due after credit given for the \$500.

C. D. Scott, for the plaintiffs.

W. E. Middleton, for the defendant.

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[THE MASTER IN CHAMBERS, 31ST MARCH, 1908.]

O'FLYNN v. MIDDLETON.

*Costs—Lien of solicitor—Charging order—Lands in question in redemption suit—Registry of lis pendens—Discharge of.*

Rule 1129, which empowers the Court or a Judge to declare that a solicitor, who has been employed to prosecute or defend any case, etc., shall have a lien on the property recovered or preserved through his instrumentality, is construed liberally, so as not to deprive the solicitor of his lien.

A *lis pendens* registered by the solicitor against land, the subject matter of a redemption action, wherein costs were incurred by the solicitor, will not be discharged on a motion therefor in Chambers, but will be left for the decision of the trial Judge after the hearing of the evidence.

E. E. A. DuVernet, for the plaintiff.

C. A. Moss, for the defendant.

## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 20TH FEBRUARY, 1908.]

GOULD v. BRITT.

*Security for costs—Plaintiff resident out of jurisdiction—Plaintiff a judgment creditor of defendant.*

Where plaintiff, a resident out of the jurisdiction, having a judgment in the St. John County Court against the defendant for \$67.75, which was defeated by certain conveyances made by the defendant, brought a suit to have the same set aside as fraudulent and void, he was ordered to give security for costs.

G. H. V. Belyea, for the plaintiff.

J. J. Porter, for the defendant.

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[29TH MAY, 1908.]

CUSHING SULPHIDE CO. v. CUSHING.

*Discovery—Documents—Identification—Description in affidavit.*

Where discovery of documents is made, it is not enough to make them up in sealed bundles marked A and B, but the documents must be identified by a mark or number and so described in the affidavit.

W. Pugsley, A.-G., and A. P. Barnhill, for the defendant.

A. H. Hanington, K.C., for the plaintiffs.

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[18TH JUNE, 1908.]

CUSHING SULPHIDE CO. v. CUSHING.

*Discovery—Documents—Non-materiality—Production—Foreign commission—Inspection.*

Where discovery, as distinguished from production for the purpose of inspection, of documents, is sought, an affidavit

of such documents must be given, though their production when applied for could be successfully opposed on the ground of immateriality.

Documents within the jurisdiction of the Court will not be ordered to be produced before a commissioner for taking evidence abroad except in very special circumstances.

Where inspection of documents had been given by consent, an application to the Court for further inspection was granted, and the Court declined to give effect, as too technical, to an objection that a demand in writing for inspection had not been made prior to the application to the Court.

*W. Pugsley, A.-G., L. A. Currey, K.C., and A. P. Barnhill,* for the defendant.

*A. H. Hanington, K.C.,* for the plaintiffs.

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### FAIRWEATHER v. ROBERTSON.

*Easement—Right of way—Agreement—Evidence—User.*

The plaintiff claimed a right of way over a private road 700 feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title, K., was that, shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing a right of way with them over the road. B. denied that an agreement was concluded, or that the matter ever proceeded beyond negotiation, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the land was included in the conveyance from K. to the plaintiff. The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, until it was torn down, situate about 200



feet from the public highway, and the plaintiff had used, but not without interruption, the road for about 15 years, for a considerable part of its length. Shortly after the date of the alleged agreement, fences with gates, crossing the road at separate points, were erected by H. without objection by K.

*Held*, that the plaintiff's bill for an injunction to restrain the defendant from obstructing plaintiff in the use of the road, should be dismissed.

*C. J. Coster*, for the plaintiff.

*A. H. Hanington*, K.C., and *M. G. Teed*, K.C., for the defendant Robertson.

*A. O. Earle*, K.C., for the defendant Lloyd.

## MANITOBA.

### In the King's Bench.

[FULL COURT, 28<sup>RD</sup> MAY, 1908.]

#### MILLER v. CAMPBELL.

*Injunction—Threatened injury to property by blasting operations—Discretion of Judge—Quia timet actions—Evidence—Affidavits in reply.*

Appeal from an order for an interlocutory injunction.

The action was brought by a firm of hardware merchants in Winnipeg, owning and occupying a substantial building for the purpose of their business, against a firm engaged in the erection of a warehouse on land adjoining the plaintiffs' building, and the contractor carrying on the work of such erection. The plaintiffs alleged that the defendants had been using and were continuing to use blasting powder or other explosive substance in excavating for the purpose of loosening the frozen earth; that the effect of the use of the blasting powder was to cause serious vibration through all parts of plaintiffs' building; that the continued vibration caused by the continued explosions was injuring and weakening the plaintiffs' building and causing irreparable damage thereto.

An interim injunction was granted *ex parte* for a limited period absolutely restraining defendants from blasting in connection with the excavation of earth on the land mentioned.

Upon motion to continue the injunction an order was made which was the subject of appeal. By it the defendant Alsip, the contractor, was restrained from blasting in such a manner as to injure the plaintiffs' building.

Besides appealing from the order upon the merits, the defendant Alsip complained that evidence was received in reply which went merely to strengthen the original case, and, also, that material facts were not disclosed upon the application for the original order. It appeared that an opportunity was given to the defence to answer the affidavits in reply.

*Held*, that it was within the discretion of the Judge to receive the affidavits upon terms which should be fair to the defence. At the same time it must be understood that there was no absolute right to offer such evidence in reply: *Peacock v. Harper*, 7 Ch. D. 648; *Gilbert v. Comedy Opera Co.*, 16 Ch. D. 594.

The case made by the statement of claim was solely one of injury to the plaintiffs' building, actual and prospective, through vibration. The case must be treated as one of prospective injury; the general principles applicable to such a case are those laid down in *Fletcher v. Bealey*, 28 Ch. D. 688, and *Attorney-General v. Manchester*, [1893] 2 Ch. 87, for *quia timet* actions.

There was evidence of a probability of injury to the plaintiffs' building by the continuance of the blasting operations, as they had been carried on before the commencement of the action. The Judge who continued the injunction was of opinion that the probability was very great, indeed, and the evidence was such that he might, not unreasonably, form that opinion.

Appeal dismissed with costs, to be paid by defendant Alsip upon the final disposition of the cause, in any event of the cause.

*J. A. M. Aikins*, K.C., and *I. Pitblado*, for the plaintiffs.

*J. Stewart Tupper*, K.C., and *G. D. Minty*, for the defendant Alsip.

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[FULL COURT, 28RD MAY, 1908.]

### CAMPBELL v. McKINNON.

*Bills of Sale Act, 63 & 64 V. c. 31*—"Crop to be grown in the future"—*Lease*—*Proviso that all crops to be property of lessor—Seizure while crop in possession of lessee.*

Appeal from a judgment of a County Court in favour of an execution creditor upon an adverse claim to a quantity of grain seized in stack, unthreshed.

The claimant let to the debtor a farm by an indenture, reserving as rent "the . . . share or proportion of the whole crop of the different kinds and qualities which shall be grown upon the demised premises as hereinafter set forth." The lessee was to deliver the whole crop except hay, in the name of the lessor, at an elevator to be named by the lessor.

There was a proviso that "all crops of grain annually grown upon the said premises shall be and remain the absolute property of the lessor until all covenants, conditions, provisos, and agreements herein contained have been fully kept, performed, and satisfied."

There was a covenant by the lessor to deliver to the lessee two-thirds of the proceeds of the crop to be stored, less any sum retained for taxes, or advances.

The grain in question was raised by the lessee upon the demised farm, and had, until seizure, remained in his possession thereon. The claimant claimed it as owner under the terms of the lease, and not for rent.

*Held*, that, taking the lease as a whole, it was very clear that the share intended to be reserved as rental was one-third of the crop of grain; the remaining two-thirds were to be security for advances. The clause giving the lessor the property in the crops could not be interpreted as operating to prevent the lessee from ever having any property therein. *Prima facie* the property in the whole, until so paid over, would be in the lessee. There was nothing to indicate that he was to cultivate the soil as the servant, agent, bailee, or other instrument of the lessor. The legal property was to be in the lessee until delivery at the elevator, but from that time it was to be in the lessor, but as to two-thirds for the benefit of the lessee, subject to the lessor's charge for advances, etc. In equity the lessor was but a mortgagee.

If, however, the lessor was not to take the legal property until delivery, he would upon the principles stated in *Bank of British North America v. McIntosh*, 11 Man. L. R. 503, be treated in equity as having a lien or charge thereon for the moneys intended to be secured.

In either case the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, 63 & 64 V. c. 31, ss. 31, 33. When the lease was made the crop was not in existence. It was then a "crop to be grown in the future," and s. 31 would apply.

By s. 182 of the County Courts Act, R. S. M. c. 33, an equity of redemption or other equitable interest of a debtor is subject to seizure under execution.

*H. M. Howell*, K.C., for the claimant.

*C. P. Wilson*, for the execution creditor.

[KILLAM, C.J., 5TH MAY, 1903.]

## REX v. RIDEHAUGH.

*Criminal law—Assault—Summary trial—Election—Police magistrate—Jurisdiction—Right to trial by jury—Imprisonment—Criminal Code, ss. 785, 786.*

Application for habeas corpus. The prisoner was charged before a police magistrate with assault. Before he proceeded to try the prisoner, the clerk of the court addressed her in the words following:—"Do you consent to be tried summarily by the magistrate, or do you wish to be tried by a jury?" or in words to the same effect.

The prisoner consented to be tried summarily, and pleaded guilty to the charge, and the magistrate sentenced her to one year's imprisonment with hard labour.

It was contended that the magistrate had no jurisdiction to impose one year's imprisonment with hard labour for assault; that he should personally have notified the accused of her right to be tried by a jury, and could not do so through his clerk; and that not more than two months' imprisonment could be imposed on a summary conviction.

*Held*, that the section substituted by 63 & 64 V. c. 46, sched., for s. 785 of the Criminal Code, 1892, gives to a police magistrate power to impose the same punishment for a common assault as could be imposed upon a person convicted on indictment. The magistrate may ask the question provided for by s. 786 of the Code through the mouth of his clerk.

The clause does not require the exact words to be used, and they may be varied by the clerk to suit the circumstances.

The conviction on its face shewed the election to be tried summarily in the statutory form, and there was nothing upon the evidence to shew that the necessary question was not put to the accused.

Application refused.

*R. A. Bonnar*, for the prisoner.

*G. Patterson*, for the Crown.

[KILLAM, C.J., 11TH JUNE, 1908.]

**In re HOUGHTON AND RURAL MUNICIPALITY OF ARGYLE.**

*Municipal corporation—Local option by-law—Application to quash—Alleged irregularities—Submission to electors.*

Application to quash a local option by-law of the rural municipality of Argyle, passed in 1889, under the Liquor License Act, 52 V. c. 15.

Three objections were taken: (1) that the by-law was not signed by the reeve; (2) that the by-law fixing the day, hour, and places for taking the vote was not signed by the reeve, or sealed with the corporate seal; and (3) that the notice of the by-law and of the purpose to take the vote thereon was not published during the period in which it was required to be published.

By s. 428 of the Municipal Act, R. S. M. 1902 c. 116, an application to quash a by-law cannot be entertained unless the application is made within one year from the passing of the by-law, "except in the case of a by-law requiring the assent of the electors or ratepayers, when the by-law has not been submitted to, or has not received the assent of, the electors or ratepayers." A similar provision, differing only as to the period of limitation, was in force when the by-law in question was enacted: see 49 V. c. 52, s. 328.

*Held*, that the above provision meant a submission in fact and an assent in fact as ascertained by a submission in fact, without reference to the validity of the formalities attending the submission.

The alleged by-law was submitted to a vote of the electors and received their assent, and it had stood without objection for over thirteen years.

The summary method of quashing a by-law was the creature of the statute, and must be taken with the limitations imposed by the statute.

Motion dismissed with costs.

*T. Seaton Ewart*, for the applicant.

*A. J. Andrews*, for the municipality.

## BRITISH COLUMBIA.

## In the Supreme Court.

[FULL COURT, 20TH JANUARY, 1908.]

AH TAM v. ROBERTSON.

*Bankruptcy and insolvency—Assignment for benefit of creditors—Preferential claim—"Wages or salary of persons in employ" of assignor—Creditors' Trust Deeds Act, 1901, ss. 36, 37—Contractor.*

The plaintiff contracted with cannery proprietors to supply them with such skilled labour as they might require during the canning season of 1898, the contract providing, *inter alia*, that the plaintiff would when required proceed to the cannery with not less than twenty-five skilled workmen; that the plaintiff would at all times use due diligence; that the proprietors would furnish all necessary tools and pay the plaintiff a certain price for each case of salmon put up; that the plaintiff should be responsible for losses occasioned by the want of sufficient labour; that, if the proprietors' manager disapproved of any workmen, the plaintiff should remove them and substitute others; that in the event of any dispute between the parties the decision of the proprietors' manager should govern; and that the plaintiff should act as foreman for the labourers at a wage of \$50 per week, and should devote all his time to carrying out the work specified.

The proprietors assigned for the benefit of creditors, and the plaintiff, who had fulfilled the terms of the agreement, claimed under s. 36 of the Creditors' Trust Deeds Act, 1901, as a preferential claim, the prices of the cases of salmon put up within the three months next preceding the assignment.

*Held*, affirming the decision of IRVING, J., that the position occupied by plaintiff was that of an independent contractor rather than that of a servant, and so he was not entitled to a preference.

*Alexis Martin and A. F. W. Solomon*, for the plaintiff.

*Harold Robertson*, for the defendant.

**In the County Court of Westminster.**

[BOLE, Co.J., 10TH JUNE, 1903.]

**GRACE v. HART.**

*Principal and agent—Agent for sale of land—Agreement for commission—  
Forfeited deposit—Right of agent to expenses.*

Action to recover \$15, under the circumstances set out in the judgment.

*W. Myers Gray*, for the plaintiff.

*R. L. Reid*, for the defendants.

BOLE, Co.J.—The suit, although brought for a small sum, involves an important principle. The facts appear to be as follows. The plaintiff, having some land for sale, went to Mr. Eastman, representing the defendants, a firm of real estate agents, carrying on business at New Westminster, and instructed them to sell it for \$750, the defendants to receive ten per cent. commission for their trouble in the matter, nothing being said about the plaintiff having to pay anything by way of expenses or otherwise beyond ten per cent. commission on the amount of purchase money. A Mr. Jacobson came to the defendants, and intimated his readiness to purchase the land at \$750, and paid \$15 for an option of 30 days or forfeiting deposit; at the end of that time the purchaser failed to complete his purchase, and the plaintiff applied to the defendants to pay him over the \$15 deposit so forfeited, as being his property, money paid to his use.

The contract seems not unlike that declared on in *Green v. Mules*, 30 L. J. C. P. 343. Unless the defendants procured a purchaser, they had no claim for any expenses, no matter how justly incurred; their remuneration was to be ten per cent. and no more.

So much for the question of expenses, which I think are not recoverable against the plaintiff.

With respect to the money itself, it appears to me to have been paid by the intending purchaser as a deposit under a contract for the sale of land to the vendor's agents, the defendants, and no agreement with the vendor that the money should be held by the recipients as agents for both the vendor and purchaser, to be under certain circumstances returned to the purchaser, was shewn or suggested. In the absence of

such an agreement, the money is paid to a person who has not the character of stakeholder, and it follows that when the money reaches his hands it is the same thing, so far as the person who paid it is concerned, as if it had reached the hands of the principal; if so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any condition or subject to any trust in relation to the payer; vide per Bowen, L.J., in *Ellis v. Goulton*, [1893] 1 Q. B. at p. 352.

But I think the plaintiff should pay ten per cent. commission on the \$15 in question, so that judgment will go for \$13.50, with costs.

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## ONTARIO.

## Supreme Court of Judicature. ✓

## COURT OF APPEAL.

FALCONBRIDGE, C.J.]

[20TH JUNE, 1901.

BALFOUR v. TORONTO R. W. CO.

*Street railways—Negligence—Car running backwards—Jury—Answers to questions.*

The plaintiff was injured by a waggon in which he was being driven being struck by an electric car of the defendants which was running backward in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed.

*Held*, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question.

*Per* ARMOUR, C.J.O.—Questions to the jury must be in writing.

*Per* OSLER, J.A.—While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course.

Judgment of FALCONBRIDGE, C.J., affirmed.

*James Bicknell*, K.C., for the appellants.

*John MacGregor* and *H. M. East*, for the respondent.

## HIGH COURT OF JUSTICE. V

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 27TH JUNE, 1903.]

## LINTS v. LINTS.

*Life insurance—Benefit certificate—Beneficiary—Designation—Substitution  
—“Dependent”—Statute—By-laws of society.*

The applicant for a benefit certificate in the Independent Order of Foresters designated in his application, which was expressly made part of the certificate, his mother as his beneficiary, adding, however, the following qualification, “reserving to myself the power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order.” Some years afterwards the insured made application under the rules of the Order to change the beneficiary from his mother to a woman who was living with him as his wife, but was not married to him. This was permissible under the rules of the Order, but not under the provisions of R. S. O. 1897 c. 203, s. 151, s.-s. 3, inasmuch as the intended transferee was not a privileged beneficiary within the statute, which forbids the diversion of a benefit from a beneficiary of a privileged class, such as the insured’s mother, to a beneficiary not belonging to that class.

*Held*, that, notwithstanding that the original designation of a beneficiary was declared to be subject to the by-laws of the society, which in effect made the designation revocable, the power to revoke the designation and divert the benefit to another, could be exercised only within the limits laid down by the statute.

*J. J. Warren*, for the plaintiff.

*R. U. McPherson*, for the defendant.

[STREET, J., BRITTON, J., 29TH JUNE, 1903.]

## STEWART v. GUIBORD.

*Equitable execution—Declaration of right to apply amount due to plaintiff by one defendant against co-defendant—Foreign judgments—Declaratory judgment—Consequential relief—Claim against Government—Statute of Limitations—Absence of defendant from Province.*

Appeal from judgment of MEREDITH, C.J., reported 2 O. W. R. 168. The plaintiff claimed against the defendant

Lallemand upon certain judgments recovered in Quebec, of which judgments he was assignee. He also asked a declaration that a certain claim against the Dominion Government held by the other defendant, Guibord, was held by him merely as trustee for Lallemand, and that the latter was the true beneficial owner of it.

*Held*, that, inasmuch as the plaintiff suing in this Province on the Quebec judgments was only in the position of a simple contract creditor,—and not of a judgment creditor,—he was not entitled to the declaration asked, because the reasons which prevent the owner of a mere simple contract debt not reduced to judgment from taking garnishee proceedings or proceedings for equitable execution, prevent his having any locus standi to obtain the preliminary relief of a declaration that the debt which he desires to seize is due to his debtor. Moreover, the claim as to which the declaration was sought being against the Government, no consequential relief was or could be asked, and this being so, the authorities were against the right of the plaintiff to obtain a mere declaration.

*Held*, also, that, though the Quebec judgments were recovered on the 10th October, 1893, and this action not begun till the 29th May, 1902, and being in this Province merely simple contract debts, the judgments would, under ordinary circumstances, be barred at the end of six years, yet, since at the time of recovery of the judgments Lallemand was domiciled and resident in Quebec, and had never been in this Province since then, the plaintiff's remedy on them was saved by R. S. O. 1897 c. 324, s. 40.

*Glyn Osler*, for the plaintiff.

*W. E. Middleton*, for the defendants.

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[OSLER, J.A., 15TH JULY, 1903.]

### CLERGUE v. McKAY.

*Vendor and purchaser—Offer to sell—Purchaser pendente lite—Certificate of lis pendens—Specific performance—Delay—Damages.*

A letter by the vendor's agent to a probable purchaser, giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and, upon the person so written to stating that he

wishes to buy at the price named, a contract of sale and purchase is constituted between the parties.

After the contract for sale had been entered into, the vendor sold and conveyed the land in question, which was of a speculative character, to a third person, who purchased in good faith and without notice of the prior contract. Before he registered his deed the original purchaser began this action for specific performance and registered a certificate of *lis pendens*, but, although he knew of the second sale, he did not take any step in the action, or make the second purchaser a party, for nearly twelve months.

*Held*, that the second purchaser's rights were not affected by the registration of the certificate; and that in any event the delay would have been fatal to the claim for specific performance as against him.

The vendor having deliberately broken his contract because of a better offer, substantial damages were assessed against him.

*J. M. Clark, K.C., and N. Simpson, for the plaintiff.*

*G. H. Watson, K.C., and W. H. Hearst, for the defendants.*

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[STREET, J., 20TH JUNE, 1908.]

### McMILLAN v. ORILLIA EXPORT LUMBER CO.

*Chose in action—Assignment of—Notice to debtor—Judicature Act—Sufficiency of notice.*

One Hurdle, to whom the defendants owed \$184.93, being \$124.80 for oak lumber, and \$60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice which the plaintiff gave the defendants of this assignment stated that he had an order from Hurdle for the amount due, in respect to a purchase of oak lumber bought by the defendants' agent. At the same time an account of Hurdle's against the defendants in the matter went to shew that, as above stated, only \$124.80 was due for oak lumber, while the balance, \$60.13, was for basswood lumber. The plaintiff drew on the defendants for the amount, and the defendants refused to accept the draft, on the ground that they had no order from Hurdle to pay the \$184.93. Thereupon the present action was brought.

*Held*, that, though there was sufficient to put the defendants upon inquiry in the notice they received, as to an assignment to the plaintiff of the money due by them to Hurdle, yet it was not sufficiently clear and express to entitle the plaintiff to sue, under the section of the Judicature Act relating to assignments of choses in action, being ambiguous enough to justify them in asking the plaintiff whether the assignment covered the oak lumber only, or the basswood as well as the oak.

The statute requires the notice to be express notice in writing, and there should be nothing equivocal about it, nothing to put the debtor in doubt whether the whole debt or only a part of it has been assigned. The notice here fell short of this requirement.

*F. E. Titus*, for the plaintiff.

*R. D. Gunn*, K.C., for the defendants.

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## IN CHAMBERS.

[THE MASTER IN CHAMBERS, 6TH JUNE, 1908.]

### JOHNSTON v. LONDON AND PARIS EXCHANGE.

#### *Evidence—Discovery—Production—Action for penalties.*

It is improper in an action to recover penalties under the Extra-Provincial Corporations Act, 63 V. c. 24 (O.), to issue the usual præcipe order for production of documents by the defendants.

Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside.

*George Bell*, for the plaintiff.

*R. B. Beaumont*, for the defendants.

## NOVA SCOTIA.

## In the Supreme Court.

## IN CHAMBERS.

[GRAHAM, E.J., 80TH JUNE, 1908.]

*In re* PAYZANT.

*Will—Legacy—Conditional gift—Charitable bequest—Fulfilment of condition—Procuring like sum.*

Testator left a legacy of \$20,000 to the corporation of the town of Windsor to assist in building and maintaining an hospital for the sick, on condition that the town should "procure a like sum by a tax on the citizens, or from private donations or otherwise, to be added to this bequest." There was a gift over to another legatee, if the town, within seven years after the decease of testator, "fails to raise" the said additional sum. The sum of \$6,000 was raised from private donations, and the balance of \$14,000 was procured by grant from the Provincial Government. The trustees took out an originating summons, and a question was raised as to whether the condition in the will was complied with.

W. B. A. Ritchie, K.C., for the legatee opposing.

A. Drysdale, K.C., for the town corporation.

GRAHAM, E.J.:—In my opinion, the words of the condition are broad enough to cover the amount procured from the Government. It is a tax on the citizens or otherwise, and private donations or otherwise. When the testator suggested that the town might procure the additional sum (presumably under special legislative enactment) from the taxes, I think his sole motive was not to stimulate others in a like position with himself to deeds of charity. His object was rather to have an hospital for the town, and, not feeling disposed to bear the whole burden himself or to exceed the \$20,000 in his giving, he stipulated that the corporation would have to procure \$20,000 in any way it honestly could. The Provincial Government has not infrequently been a party to handsome grants for charitable purposes. The legacy must be paid to the town. The costs of all parties are to be paid out of the fund.

[GRAHAM, E.J., 2ND JULY, 1908.]

## WATSON v. LEUKTON.

*Assault—Action for—Particulars.*

The plaintiff sued for damages for an assault and battery on the 9th day of April, 1903, on the S. S. "Dahome," then being in Demerara; also for an assault and battery on board the "Dahome," then being on the high seas. The defendant applied for particulars.

*J. J. Power*, for the plaintiff.

*W. B. A. Ritchie*, K.C., for the defendant.

GRAHAM, E.J.:—As the month of April may cover an assault and battery other than that of the 9th, I think there ought to be particulars in order to prevent surprise at the trial. An assault is such an easy thing to commit that notice of the particular occasion should be given.

## MANITOBA.

## In the King's Bench.

[FULL COURT, 4TH JULY, 1908.]

## ROGERS v. SORELL.

*Landlord and tenant—Building let in flats—Approaches out of repair—Damage by rain—Liability of landlord—Notice of non-repair to tenant.*

County Court appeal. The plaintiff sued for damage done to a show case and goods in a store which she occupied as tenant to the defendant, in a two-storey block, through the falling of plaster occasioned by rain water alleged to have entered "through a certain opening in the wall of said building upstairs at the end of a certain public stairway or hall of said block, which said stairway and hall it was the defendant's duty to keep in proper condition, and which opening it was her duty to keep closed on such occasions." The defendant owned a block of two storeys let to different tenants;

the rooms in the second storey were reached from the street by a stairway and hall; at the back end of the hall there was a door, opening upon an uncovered stairway, by which access was had to the yard in rear of the block; when the block was erected a fanlight was put over the door, but the glass was subsequently broken, leaving a direct unprotected opening to the outside of the building. The fastening of the door got out of order, and the door could not be closed. A heavy rain came on with a high wind from the back of the building, and a large quantity of rain was blown in through the open fanlight, the water flowed over the floor just above the plaintiff's store, and caused the fall of a portion of the plaster, and the injury of which the plaintiff complained.

The trial Judge found that the opening in the fanlight existed when the store was let to plaintiff and that defendant knew of it; it should also be inferred that the plaintiff had notice of it.

Judgment was entered for the plaintiff, and the defendant appealed.

*Held*, that the appeal should be allowed, judgment for plaintiff set aside and judgment entered for defendant, with costs of the appeal, but without costs of the action.

It is clearly settled law, that the mere relation of landlord and tenant does not raise any implied contract on the part of the landlord to keep the demised premises in repair: *Pomfret v. Ricroft*, 1 Saund. 320; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507.

The trial Judge admitted that principle, but held defendant liable on the ground that the door, hall, and stairways were not a portion of the demised premises, but were in the actual possession of the defendant, who owed a duty to the occupants of other portions of the building to observe care to prevent the portions not demised from falling into such a condition as would make them a source of injury to those occupants: *Long v. Hancock*, [1893] 2 Q. B. 177.

The defendant was not bound to remedy, or protect the plaintiff from the effect of, an obvious defect in the building existing at the time of the demise. A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such as are apparent at least.

*F. Heap*, for the plaintiff.

*T. G. Mathers*, for the defendant.



[FULL COURT, 4TH JULY, 1908.]

CASS v. COUTURE.

CASS v. McCUTCHEON.

*Contract—Specific performance—Interlocutory injunction to restrain breach—Question of damages.*

Orders had been made restraining the defendants from delivering brick manufactured by them during 1903, except in accordance with the terms of a contract between the plaintiff and four persons or firms engaged in the manufacture of brick in or near the city of Winnipeg.

Orders were formally made without argument to facilitate appeals to the full Court.

The plaintiff's claim was that, by the contract in question, the four manufacturers severally agreed to sell to him the outputs of their respective brickyards for the season, and agreed with him not to sell any of such brick except in accordance with the terms of the contract. The defendants were some of the manufacturing parties.

The agreement recited that the plaintiff was forming a company to be incorporated and that he was desirous of purchasing the outputs of bricks of the four manufacturers, "such purchase being made for the benefit of the proposed company," and the agreement set out the intention of the plaintiff to assign all his interest in the contract to the company upon its incorporation, and stipulated that, upon such assignment, the company should be substituted for the plaintiff in the contract. The evidence shewed that defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the company and its interests in the proposed purchases were material portions of the arrangements.

The plaintiff alleged that, relying upon the agreement, he had entered into building contracts and would require all the bricks called for by the agreement, and unless defendants supplied same it would be impossible for him to carry out his works.

*Held*, that the appeals should be allowed and orders for injunctions discharged. Costs of the motions and of the appeals to be reserved to be disposed of at the trial or by further order.

Such circumstances, in case of a similar agreement for the supply of bricks to a plaintiff on his own account and for his personal benefit, might not unreasonably be ground for an interlocutory injunction. Whatever claim to damages the plaintiff might be able to assert, the circumstances in the present case formed no ground for interference by interlocutory injunction. For any loss of profits upon resales of bricks damages would be a sufficient compensation, and it did not appear that the personal interest of the plaintiff and his associates should be considered. While plaintiff presented a strong case, it was not absolutely certain that there were no defences.

To justify a grant of specific performance by interlocutory injunction, the plaintiff should shew that its refusal would entail a loss for which a judgment for the damages probably recoverable by action would not justly compensate him.

*J. S. Ewart, K.C., F. H. Phippen, and G. D. Minty, for the plaintiff.*

*J. A. M. Aikins, K.C., H. A. Robson, and A. J. H. Dubuc, for the defendants.*

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[FULL COURT, 6TH JULY, 1908.]

### HENRY v. BEATTIE.

*Fire insurance—Application made to agent—Gross negligence on his part in not sending application to company—Liability of agent.*

Appeal from decision of RICHARDS, J., *ante*, p. 30.

Appeal allowed with costs; judgment for plaintiff set aside and action dismissed without costs.

The case made by the statement of claim was not proved, but, at most, it was proved that the defendant was to forward the application to the loan company, and it was to be expected to apply for the insurance.

At the present stage the statement of claim should not be amended to make that case.

[FULL COURT, 6TH JULY, 1908.]

*In re BONNAR.*

*Mandamus—Election Act, R. S. M. 1902 c. 52—Revising officer—Duties—Board of registration functus officio.*

Application by one H. Sachar for a mandamus to compel R. A. Bonnar, the revising officer appointed to revise the list of electors for the electoral division of Centre Winnipeg, to enter the applicant's name upon the list of electors.

The affidavit of the applicant stated that on the 15th June he attended the Court of Revision for the purpose of applying to the revising officer to be registered as an elector, and remained there between the hours of three and five o'clock for the purpose, and that at the last mentioned hour Bonnar declared the Court closed and refused to hear any further applications for registrations.

It was admitted that Bonnar was notified under s. 72 of the Manitoba Election Act, R. S. M. 1902 c. 52, by the chairman of the board of registration, that he had been appointed to revise and close the list of electors, such notice specifying the 15th June, between the hours of 10 a.m. and 1 p.m., and between 2 p.m. and 5 p.m., during which the sittings of the Court should be held; that the date and hours were published; and that the list was closed, certified to, and returned to the chairman of the board of registration, as provided by s. 92 of the Act, after Bonnar had agreed on the Tuesday afternoon to appear in Court on Wednesday morning on this motion and had waived notice and setting down.

The points were:—(1) Whether Bonnar was justified in closing the Court of Revision at 5 o'clock of that day and in refusing to entertain any application for registration after that hour; and (2) whether, if he was not justified, a mandamus should issue to compel him to entertain such and other applications for registration of electors to be placed on the list.

It was contended on behalf of Bonnar, that, according to the instructions he received from the board of registration, he was limited for holding the Court of Revision to the day and hours fixed by the notice; that he had no power to hold the Court after the hour named; that he was then *functus officio*, and could not entertain any further application.

Under s. 97 the chairman of the board has to certify and transmit the list to the King's printer, and other books and

papers affecting the revision of the list to the clerk of the executive council. All this had been done, and the matter was entirely out of the hands of the board.

DUBUC, J., *held* that the mandamus would be nugatory and useless, and that it would utterly fail; under such circumstances it could not be granted and the application should be refused, without costs.

An appeal to the full Court was dismissed without costs. When the board had prepared and certified the lists, it and the revising officer became *functi officio*.

J. S. Ewart, K.C., and C. P. Wilson, for the applicant.

J. A. M. Aikins, K.C., and G. A. Elliott, for the revising officer.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 6TH FEBRUARY, 1908.]

#### NOBLE FIVE MINING CO. v. LAST CHANCE MINING CO.

*Mining law—Extralateral rights—Trial—Adjournment of—Mineral Act, 1891, s. 31—Appeal—Extension of time—Jurisdiction.*

Appeal from an order of DRAKE, J., on an application to postpone trial, fixing a date (peremptory) for trial. This was an action by the owners of a mineral claim for an injunction restraining the defendants, who were the owners of adjoining mineral claims, from running a tunnel from their claims on to the plaintiff's ground. The defendants claimed, under s. 31 of the Mineral Act of 1891, the right to follow on to the plaintiff's ground the vein of ore in question, because the apex of the said vein was on the surface of their claim. Before going to trial the defendants wished to do development work in order that they might determine definitely the continuity of the vein in question, and they shewed that it was impossible for them to do the work needed by the date fixed for the trial.

*Held*, allowing the appeal, that the defendants should not be forced on to trial without being given a fair opportunity of doing such development work as might be necessary to determine the position of the apex of the vein in question.

On this appeal the question of the Court's jurisdiction to extend the time limited for appeal after the time limited had once expired came up, and counsel for the appellant wished to argue that the Court had such jurisdiction and that the decision in *Sung v. Lung*, 8 Brit. Col. L. R. 423, was wrong. The Court announced that, if it became necessary to decide the point, all the Judges would be summoned to hear argument.

A decision on the point was not necessary, so it was not argued.

*E. V. Bodwell*, K.C., for the appellant.

*Luxton*, for the defendant.

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[FULL COURT, 27TH APRIL, 1908.]

GOLD v. ROSS.

*Landlord and tenant—Eviction—Surrender of term by operation of law—Creditors' Trust Deeds Act, 1901, s. 54, s.s. 5.*

This was an action against an assignee for the benefit of creditors for a declaration that the plaintiff was entitled to a privileged claim for rent against the assignor's estate under the Creditors' Trust Deeds Act, 1901.

The plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to the defendant, who did not take possession of the premises. The plaintiff, on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises, which she proceeded to clean up and repair, and she took down a sign board having on it the firm name of H. A. & Co., and painted the name out. The plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment.

*Held*, affirming the decision of HENDERSON, Co.J., who dismissed the plaintiff's action, that there had been a surrender of the premises to the landlord by act and operation of law.

*Phené v. Popplewell*, 12 C. B. N. S. 334, applied.

*R. W. Harris*, for the appellant.

*H. W. C. Boak*, for the respondent.

[IRVING, J., 1ST APRIL, 1908.]

*In re* UNITED CANNERIES OF BRITISH COLUMBIA,  
LIMITED.

*Company—Winding-up—Petition by shareholder—Insolvency—R. S. C. c.*  
*129, s. 5 (c.)—62 & 63 V. c. 43, s. 4.*

Petition filed under s. 8 of R. S. C. c. 129, as amended in 1899 by 62 & 63 V. c. 43, s. 4, by certain shareholders for a winding-up order, on the ground that the company were insolvent, the act shewing the insolvency being alleged to be the exhibiting by the company of a statement shewing their inability to meet their liabilities, the doing of which is by s. 5 (c.) of the Act made an act of insolvency.

*Held*, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. Petition dismissed.

*Charles Wilson*, K.C., for the petitioners.

*Joseph Martin*, K.C., for the company.

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## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

OSLER, MACLENNAN, JJ.A.]

[6TH MARCH, 1908.]

*In re* LENNOX PROVINCIAL ELECTION.

PERRY v. CARSCALLEN.

*Parliamentary elections—Corrupt practices—Dismissal of charges against candidate and agents—Concurrent findings of both trial Judges—Disagreement of trial Judges—Right of appeal—Ontario Election Act—Ontario Controverted Elections Act.*

The Judges at the trial of an election petition, having reserved judgment in respect of five charges, subsequently gave judgment dismissing four of these charges, both Judges agreeing as to the result. In respect to the fifth charge—a charge of payment of money by the candidate to a voter to induce such voter to vote for him—the Judges disagreed, one Judge being in favour of the dismissal of the charge, the other being of opinion that the charge was proved.

*Held*, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal.

*Held*, also, that the portions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Election Act, which are in *pari materia*; that the words “or otherwise” in s.-s. (5) of s. 57 of the Controverted Elections Act extend the effect of that sub-section to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice, and that s.-s. (6) extends it to candidates and others. That if an appeal lies in case of a disagreement

between the trial Judges, a judgment in appeal finding a candidate or other person guilty of a corrupt practice would necessarily subject him to disqualification or other disability or penalty, notwithstanding the absence of a concurrent judgment to that effect of the two trial Judges, and that this would be contrary to the statute.

*Held*, MACLAREN, J.A., dissenting, that an appeal did not lie in respect of any of the charges.

G. H. Watson, K.C., and Grayson Smith, for the petitioners.

W. Cassels, K.C., and E. Bristol, for the respondent.

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MEREDITH, C.J.]

[29TH JUNE, 1908.]

BANQUE PROVINCIALE DU CANADA v. CHARBONNEAU.

*Negligence—Agent of bank—Promissory note—Neglect to take in proper form—Subsequent material alteration—Loss of remedy on note—Damages.*

The defendant, the plaintiffs' agent at a branch, accepted a promissory note, not expressed to be joint and several, as security for an advance, instead of a joint and several one, although expressly instructed to require the latter. Shortly afterwards he discovered the mistake, and, at the suggestion of one of the makers of the note, he inserted the words "jointly and severally," on the understanding that the alteration was to be initialled by all the makers. This, however, was not done, and, after consultation with the plaintiffs' solicitor, the inserted words were crossed out by the defendant. In the result the bank were held to have lost their remedy on the note on the ground of material alteration. The bank then brought this action against the defendant for damages for negligence.

*Held*, OSLER, J.A., dissenting, that the form of the note as taken was to all intents and purposes as valid as if made jointly and severally, and therefore in this regard only nominal damages could be recoverable. The defendant, also, was not liable in damages for the consequences of his subsequent acts. What he did was done in good faith, and in ignorance of the legal consequences. The defendant exercised reasonable care and diligence in all of the circumstances of the case, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable.



Judgment of MEREDITH, C.J., awarding the plaintiffs nominal damages with costs on the appropriate scale and a set-off of costs to the defendant, affirmed.

*A. B. Aylesworth*, K.C., and *W. H. Barry*, for the plaintiffs. the appellants.

*W. D. Hogg*, K.C., and *F. A. Magee*, for the defendant.

FALCONBRIDGE, C.J.]

[29TH JUNE, 1908.

REX v. LEWIS.

*Criminal law—Manslaughter—Parent's omission to provide necessary medical treatment for child—Legal duty—Lawful excuse—Religious belief—"Necessaries"—Admission of evidence—Judge's charge.*

The word "necessaries" in s. 209 of the Criminal Code, which enacts that "everyone who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessities of life," includes proper medical aid, assistance, care, and treatment.

And, therefore, where the jury found that the prisoner, a Christian Scientist, had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age, when it was reasonable and proper that such treatment should be provided, and that the child died from such neglect:—

*Held*, that the defendant had been guilty of an indictable offence under s. 210 of the Code, which enacts that every one who as parent, guardian, or head of a family, is under a legal duty to provide necessities for any child under sixteen, is criminally responsible for omitting without lawful excuse to do so, etc.

Remarks upon the Judge's charge as to "authorized" medical aid and upon the admission of evidence of cures believed to have been wrought by Christian Scientists, even as shewing good faith.

*A. B. Aylesworth*, K.C., and *W. W. Vickers*, for the prisoner.

*J. R. Cartwright*, K.C., and *Frank Ford*, for the Crown.

LOUNT, J.]

[29TH JUNE, 1908.]

## BAXTER v. JONES.

*Principal and agent—Insurance agent—Agreement to give notice of further insurance—Omission—Liability—Gratuitous undertaking—Mandate.*

The defendant, a general insurance agent, undertook gratuitously to have an additional \$500 policy placed on the property of the plaintiffs; and, before completion of this transaction, he also undertook, at the plaintiffs' request, to notify the companies already holding policies, of the additional insurance, as was required under their policies. A loss occurred, and, owing to the defendant having failed to give such notice, the plaintiffs were placed in the power of the insurance companies and had to accept \$1,000 less than they otherwise would have received.

*Held*, that the transaction was one of mandate. If the defendant had not entered upon the execution of the business intrusted to him, he would have incurred no liability, but, having undertaken to perform a voluntary act, he was liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs: *Coggs v. Bernard*, 1 Sm. L. C. 182.

Judgment of LOUNT, J., 4 O. L. R. 541, 22 Occ. N. 372, affirmed.

G. F. Shepley, K.C., and S. F. Washington, K.C., for the appellant.

W. R. Riddell, K.C., and L. F. Stephens, for the respondents.

BOARDS OF COUNTY COURT JUDGES.]

[29TH JUNE, 1908.]

*In re* CITY OF TORONTO ASSESSMENT APPEALS.*In re* CITY OF OTTAWA ASSESSMENT APPEALS.

*Assessment and taxes—Property of electric companies—"Substructures and superstructures"—"Rolling stock, plant, and appliances"—Construction of statute—Ejusdem generis rule.*

*Held*, that 2 Edw. VII. c. 31, s. 1, s.-s. 4 (O.), substituting a new s. 18 in the Assessment Act, and providing that "save as aforesaid, rolling stock, plant, and appliances mentioned in s.-s. (2) hereof, shall not be land within the

meaning of the Assessment Act, and shall not be assessable," does not exempt the appellant companies from assessment in respect of their plant and appliances (though otherwise land within the meaning of s.-s. 9 of s. 2, of the Assessment Act), which is not upon the streets, roads, highways, etc., as mentioned in s.-s. 3 of that section.

The object of s.-s. 4 is to make it clear that rolling stock, etc., of the railway companies which is found and used in the streets, shall not, save as mentioned in s.-s. 3, be, by reason merely of the wide words "substructures and superstructures" used in s.-s. 3, be liable to taxation as land. The words "plant and appliances," following the specific term "rolling stock," are to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant, and appliances such as tools in connection with or belonging to such stock; and the reference is to "rolling stock, plant, and appliances" of such companies mentioned in s.-s. 2 as have such rolling stock.

*J. Bicknell*, K.C., and *J. W. Bain*, for the Toronto Railway Company.

*H. O'Brien*, K.C., for the Incandescent Light Company of Toronto.

*J. S. Lundy*, for the Toronto Electric Light Company.

*G. F. Henderson*, for the Ottawa Electric Company and the Ottawa Gas Company.

*J. S. Fullerton*, K.C., and *W. C. Chisholm*, for the corporation of the city of Toronto.

*A. B. Aylesworth*, K.C., for the corporation of the city of Ottawa.

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## HIGH COURT OF JUSTICE.

[BOYD, C., MACLAREN, J.A., FERGUSON, J., 5TH JUNE, 1908.]

### GILLETT v. LUMSDEN.

*Trade mark*—"Cream Yeast"—*Infringement*—*Trade name*—*Acquisition of right by user*.

The plaintiff in 1877 obtained the registration of a trade mark for a certain kind of yeast which he manufactured and sold, and in 1894 obtained another registration of the same. It consisted of a label bearing the representation of the head

and bust of a woman. with the words "Dry" and "Hop" on either side, and the words "Cream Yeast" below. In 1901 the defendants commenced selling yeast cakes in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between. The plaintiff did not use cream in the preparation of his yeast, but the defendants actually used Jersey cream in theirs.

*Held*, that the plaintiff's trade mark, if he was entitled to register it, was not infringed by the defendants' label.

*Held*, also, reversing the decision of STREET, J., 4 O. L. R. 300, that the plaintiff had not acquired the exclusive right to use the name "Cream Yeast," and was not entitled to have the defendants restrained from using it.

*G. F. Shepley, K.C., and F. C. Cooke*, for the defendants.

*C. A. Masten and J. H. Spence*, for the plaintiff.

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[BOYD, C., FERGUSON, J., MACMAHON, J., 10TH JUNE, 1908.]

### HARVEY v. McPHERSON.

*Division Courts—Jurisdiction—Dividing cause of action—Division Courts Act, s. 79—Promissory note—Including in larger claim—Proof against insolvent estate.*

The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim.

*Held*, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a Division Court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of s. 79 of the Division Courts Act, R. S. O. 1897 c. 60, forbidding the dividing of a cause of action.

*A. McLean Macdonell*, for the plaintiffs.

*C. A. Moss*, for the defendants.

[BOYD, C., FERGUSON, J., MACMAHON, J., 11TH JUNE, 1903.

### AHRENS v. TANNERS' ASSOCIATION. ✓

*Discovery—Examination of officer of company—Agent of unincorporated association.*

The plaintiffs sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as the Tanners' Association."

*Held*, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending.

C. A. Moss, for the plaintiffs.

W. N. Tilley, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 18TH JULY, 1908.

### SMALL v. HYTTENRAUCH. ✓

*Parties—Representation of classes—Rule 200—Members of unincorporated voluntary association—Trade union.*

Rule 200 provides that "In an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all parties so interested." The plaintiff complained that the members of the London Musical Protective Association, at meetings of the whole association, and by the executive committee of the association, had agreed with one another to order one Cresswell, a member of the association, and his orchestra, to break a contract existing between them and the plaintiff, to play in the plaintiff's opera house; and asked for an injunction to restrain them from carrying out this design.

There were four classes of defendants:—(1) Seven persons who were officers and leading members of the London Musical Protective Association, which was the local branch of the American Federation of Musicians, these seven being sued on behalf of themselves and all other members of the association. (2) The American Federation of Musicians. (3) The London Musical Protective Association. (4) Joseph

Weber, the president of the federation, a resident of the State of Ohio.

*Held*, that the case as regarded the local association was brought within the above Rule, and the plaintiff was entitled to an order that the seven individual defendants might be sued and was authorized to defend on behalf of all the members of the London Musical Protective Association other than Cresswell and the members of his orchestra; but not to an order that these same defendants and the defendant Weber might be directed to defend on behalf of the federation.

*J. H. Moss*, for the plaintiff.

*J. G. O'Donoghue*, for the individual defendants except Joseph Weber.

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[*Moss*, C.J.O., 26TH MAY, 1903.]

### MACDONELL v. BEST.

*Registry laws—Certificate of allowance of petition under Partition Act—Lien of execution creditor—Expiry of writ—Preservation of lien—Notice—Bona fide purchaser for value—Priorities.*

At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a bona fide purchaser for value.

*Held*, that the company's lien was not preserved by the proceedings taken before the conveyance to G., who was not, therefore, affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands.

*W. M. Douglas*, K.C., for the company.

*Grayson Smith*, for the defendant Mary E. Gamble.

[MEREDITH, C.J., 27TH JULY, 1908.]

## BOURQUE v. CITY OF OTTAWA.

*Municipal corporations—Contract to construct sewers—Interference by reason of other city sewers—Liability of municipality.*

The plaintiff entered into a contract with the corporation of the city of Ottawa to construct certain sewers. In the course of his work the contents of certain city sewers, which existed in the streets in which the plaintiff was required to build the sewers he had contracted to construct, the existence of which was not known to and was not disclosed to him, flowed into the trenches dug by him and impeded and delayed him in the work and caused him additional expense in doing it.

*Held*, that the plaintiff was entitled to recover damages from the defendants for the loss he had thus sustained, for the defendants owed him a duty to do nothing to prevent or interfere with his doing the work he had contracted to do, and in discharging through the sewers under their control upon his work the sewage and other matter which they carried, they committed a breach of duty for which they were answerable to him in damages.

*N. A. Belcourt*, K.C., for the plaintiff.

*T. McVeity*, for the defendants.

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✓ [MEREDITH, C.J., 27TH JULY, 1908.]

## SAUNDERS v. BRADLEY.

*Will—Trusts—Provision for the appointment of new trustee—Construction—Persons to exercise powers—Time for exercising.*

A testator appointed his two brothers executors and trustees of his will, and provided that in the event of the death, inability, or refusal to act of either of them, "then my surviving brothers and sisters or a majority of them shall by an instrument in writing . . . appoint a new trustee," etc. The testator died in 1899, and probate was granted to the two brothers, one of whom died in the same year. In 1900, by an instrument in writing, a majority of the brothers and sisters of the testator then living (one other brother having also died in 1899, after the testator,) appointed the plaintiff a trustee in place of the deceased executor.

*Held*, that the appointment was valid.

The power to appoint a new trustee became operative in case either of the events provided for happened, whether in the lifetime of the testator or after his death; and it was the survivors of the brothers and sisters at the time of exercising the power, or a majority of them, who had the power to appoint.

*A. B. Aylesworth, K.C., and F. W. Kittermaster, for the plaintiff.*

*W. R. Riddell, K.C., and H. J. Dawson, for the defendant.*

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[STREET, J., 28TH MAY, 1908.]

DENISON v. TAYLOR.

*Sale of goods — Warranty — Correspondence — Construction — Breach — Damages.*

The plaintiff, a private banker, wrote to the defendants, safe makers: "Can you give me a rough estimate of what a burglar-proof door with proper frame complete will cost?" The defendants answered: "We can build you a burglar-proof door of any size and description you wish. The cheapest door we now make is \$250 . . . our No. 67, the outer door being 1 1-8 inches thick, the entire surface protected with hardened drill proof plate. . . Next better quality of door to this is one 1 1-2 inches thick at \$400, and the next \$550." They enclosed cuts of three vault doors, Nos. 67, 68, and 69; the two latter were called "fire and burglar proof vault doors;" No. 67 was called "fire proof vault door with chilled steel lining;" and the printed note below the cut read, "The above cut represents our vault doors suitable for post offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door." The plaintiff replied: "Would No. 67 furnish a fair protection against burglars?" The defendants telegraphed: "No. 67 door gives both fire and burglar proof protection." The plaintiff then ordered a No. 67 door, which was supplied to him and put into use. Shortly afterwards it was blown open by burglars, and this action was brought to recover damages for breach of warranty. It appeared from the evidence that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the



door was wrecked. The door having been taken to pieces during the trial, it was found that the centre layer of the three layers making up the door, which was represented to be hardened drill proof plate, was neither hardened nor drill proof, and was easily perforated by an ordinary hand drill in a minute and a half.

*Held*, that the correspondence could not be construed as containing an absolute warranty on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time or place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safe makers could make them. Both warranties had been broken.

*Held*, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of these defects was not the reason why the burglars were enabled to break it open; but the plaintiff, having sustained a total loss by reason of the article supplied being valueless, was entitled to recover as damages the price, \$250.

*I. F. Hellmuth*, K.C., and *Shirley Denison*, for the plaintiff.

*Walter Cassels*, K.C., and *W. H. Blake*, K.C., for the defendants.

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[STREET, J., 80TH MAY, 1908.]

PALMER v. MICHIGAN CENTRAL R. W. CO.

*Railway—Farm crossing—Approaches—Repair.*

Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto within the farm.

*J. A. Robinson*, for the plaintiff.

*I. F. Hellmuth*, K.C., and *E. C. Cattnach*, for the defendants..

## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 9TH JULY, 1908.]

MASTERS v. MASTERS.

*Partition—Proving lunacy—53 V. c. 4, s. 80—Costs—Apportionment.*

In a suit for partition and sale of lands made necessary by reason of a co-tenant being a lunatic, her lunacy was proven by affidavit under s. 80 of 53 V. c. 4.

A motion that the costs of appointing a guardian to such lunatic and of proving the lunacy be charged upon the lunatic's share of the proceeds of the sale of the land in the above suit, was refused.

*M. G. Teed*, K.C., for the plaintiffs.

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[11TH AUGUST, 1908.]

BURDEN v. HOWARD (No. 2.)

*Discovery—Affidavit—Copy of document—53 V. c. 4, s. 60.*

Under 53 V. c. 4, s. 60, and form 10, an affidavit of discovery should negative possession of a copy of a document.

*M. G. Teed*, K.C., for the plaintiff.

*D. Jordan*, K.C., for the defendant.

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[18TH AUGUST, 1908.]

ROBERTSON v. KERR.

*Practice—Re-opening decree.*

The defendant K., an auctioneer, advertised at the instance of the defendant M. certain land for sale at public auction claimed by the plaintiff and M. This suit was

brought for an injunction restraining the sale, and for a declaration of title. An interim injunction was granted. An ejectment action was also brought by the plaintiff against M. in respect of the same land, and judgment therein was given for the plaintiff. The defendants appeared by the same solicitor and joined in their answer in this suit. At the hearing a decree was made against the defendants with costs. K. now applied for a re-hearing to vary the decree so far as it ordered him to pay costs, alleging that since putting in his answer he had had nothing to do with the conduct of the suit, believing himself to be but a nominal defendant, and his co-defendant to be responsible for the defence.

*Held*, that the application should be refused, but without costs.

G. W. Allen, K.C., for the applicant.

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#### LEWIN v. LEWIN.

*Will—Codicil—Annuity payable out of legacy—Revocation—Lapse of legacy—Date of distribution.*

Testator by his will gave to his trustees \$600 in trust to pay an annuity from the interest or corpus thereof of \$300 to his son R. during his life, and upon his death to pay to R.'s children P., S., and M., one-half, one-quarter, and one-quarter of said principal, respectively. In a subsequent clause it was provided that in case of the death of R. while any or either of said children should be under the age of 25 years, the trustees should pay to their mother while such children should be under that age an annuity of \$300 from said principal, "to which such child or children will be entitled on the decease of their father," for the maintenance of such child or children respectively, while he or she should be under that age. A codicil revoked the annuity to R. Testator was survived by R. and R.'s children, all being under the age of 25 years at testator's death, but S. was now of that age.

*Held*, that the codicil did not revoke the gift to R.'s children; that each child on attaining the age of 25 years was entitled to be paid his or her share; and that it was not the meaning of the will that the fund should be kept intact until the youngest of the children attained that age.

S. Bowyer Smith, for the trustees.

C. N. Skinner, K.C., for the father.

A. O. Earle, K.C., for residuary legatees.

W. Pugsley, A.-G., for children.

## WATSON v. PATTERSON.

*Injunction—Obstruction of river—Log driving—Removal of obstruction before motion—Dismissal of suit—Costs—Assessment of damages—Remedy at law.*

The plaintiff was prevented from driving his lumber down a tributary of the Saint John river by the closing of the passage by a pier and boom erected by the defendant in connection with his saw mill, and by logs of the defendant. The defendant was the owner of both sides of the river. This suit was for a mandatory injunction to compel the removal of the pier, booms, and logs so as to open up and to keep open a passage for the plaintiff's lumber, and for an assessment of damages. The bill was filed and motion heard on the 23rd May, two days before the passage had been opened.

*Held*, that the injunction in respect of future obstruction should be refused, and the plaintiff left to recover his damages, if any, in an action at law, but that the bill should be dismissed without costs; the plaintiff to have costs of obtaining and serving an interim injunction obtained in the matter.

*Thomas Lawson*, K.C., for the plaintiff.

*S. Alward*, K.C., for the defendant.

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McLELLAN v. TURNER.

*Injunction—Dissolution before hearing—Assessment of damages.*

Where an ex parte injunction was dissolved before the hearing of the suit, which was for a declaration of title to land, the Court postponed assessing the defendant's damages upon the plaintiff's undertaking given on obtaining the injunction, to the hearing of the suit.

*Teed*, K.C., for the defendant.

*Earle*, K.C., for the plaintiff.

## MANITOBA.

## In the King's Bench.

[FULL COURT, 11TH JULY, 1908.]

*In re BONNAR.*

*Contempt of Court—Newspaper comment—Publication tending to influence result of proceedings.*

A revising officer appointed to revise the list of electors under the Manitoba Election Act, R. S. M. 1902 c. 52, having refused to continue the sitting of his court beyond the hours named by the board of registration, on the ground that his authority had then expired, a motion was made for a mandamus to compel him to place the name of a certain person upon the list. This motion was twice adjourned, and was finally heard and refused by a single Judge, and an appeal was then taken to the full Court and dismissed.

Pending the application for a mandamus and after its original disposition, and pending the appeal, there were published in a newspaper reports of the proceedings and various editorial articles reflecting severely upon the revising officer's decision and his subsequent conduct, accusing him of partisanship and misconduct in his office.

These reports and articles were brought before the full Court by counsel for the revising officer upon the hearing of the appeal from the order refusing the mandamus, with a view to enable the Court to consider whether they constituted a contempt of Court, warranting summary proceedings against the person or persons responsible for the publications.

*Held.* that there was no case for the exercise of summary jurisdiction. The decision of the revising officer was upon a question of public importance which it was perfectly legitimate for the press to criticize and comment upon. So far as the publications were defamatory, the proper remedy of the revising officer was that which is open to other members of the community. The fact that they related to his course in a judicial capacity did not give this Court jurisdiction to take summary proceedings against the publishers: *Reg. v. Rowe*, Man. Rep. temp. Wood. 309. As to the principles which govern the Court on such applications see *The Queen v. Payne*, [1896] 1 Q. B. 577.

In the present case the subject matter of the articles was one of immediate public importance, and the Court would not be warranted in inferring that their publication was intended to influence the decision of the case before the Court, or could tend to prejudice the interests of the revising officer in the litigation.

*J. A. M. Atkins, K.C.*, for the applicant.

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[KILLAM, C.J., 29TH JULY, 1908.]

REX v. LICENSE COMMISSIONERS FOR LICENSE  
DISTRICT NO. 1,

*Re* ANDERSON.

*Liquor License Act—Local option by-law—Change of municipal boundaries  
—Continuation of prohibition—By-law in part illegal.*

Application for a writ of mandamus to direct the license commissioners to re-hear and re-consider an application of Anderson for a hotel license in Napinka in the rural municipality of Brenda.

The application came up at a meeting of the license commissioners, when there was produced a copy of a by-law of the former municipality of Brenda. The by-law was intitled, "A by-law to prevent the sale of liquor in the municipality of Brenda." It enacted that no license should be granted by the commissioners for the sale of liquors within the limits of the municipality of Brenda, and that the municipality should not receive any money for a license for such purpose. The application was indorsed: "Not granted on account of option by-law."

Napinka was situated wholly in township 4, range 25 west.

When the by-law was passed there was in the Province a municipality named Brenda, comprising townships 4, 5, and 6 in ranges 24, 25, and 26 west.

In 1890 the former division into municipalities was superseded by a new one. The municipality of Brenda disappeared, and the territory formerly comprising it was divided between two rural municipalities of Winchester and Arthur. The statute 53 V. c. 52, s. 81, provided that "In case in any

of the territory changed as to its municipal situation by the provisions of this Act, a by-law under s. 51 of c. 52 of 52 V. is in force at the time of the coming into force of this Act, such by-law shall continue to affect such territory the same as if this Act had not been passed." In 1896 a new rural municipality was created named Cameron, comprising part of old Brenda, and in 1900 another new one was constituted, by the name of Brenda, comprising townships 1, 2, 3, and 4, in ranges 24 and 25 west.

The applicant contended that the by-law was invalid originally as being one prohibiting the issue of a license, and not one merely forbidding the receipt by the municipality of money for a license, as 52 V. c. 15, s. 51, provided for; that when the old municipality of Brenda ceased to exist, the by-law lost its force and became inoperative to affect the issue of a license; and that by the subsequent changes of territory, if not before, it lost its force.

*Held*, that the illegal part of the by-law could be disregarded; there was no power to pass a by-law to prohibit the sale of liquors, or the issue of a license therefor. Two separate things were prohibited, one of which the municipality had no direct power to prohibit. There was, however, a clear intention to enact what the council was empowered to enact. If a by-law is good in part and bad in part, it is valid as to the good part, when each of the two parts is entire and distinct: *Re Fennell and Guelph*, 24 U. C. R. 238.

The case came within the language of 53 V. c. 52, s. 81: that statute was intended to cover a case like the present.

Whatever might have been the effect of the abolition of old Brenda, but for the provision of s. 81 of 53 V. c. 52, that section had the effect of continuing the prohibition of a grant of a license for that territory. It was, then, a local law governing that territory, which, in the absence of provision to the contrary, continued to govern it until abrogated by the proper authority. The prohibition remained in force. Application dismissed. No costs allowed.

*W. E. Perdue*, for the applicant.

*A. J. Andrews*, for the license commissioners.

## BRITISH COLUMBIA.

## In the Supreme Court.

[FULL COURT, 27TH JANUARY, 1908.]

## CENTRE STAR MINING CO. v. ROSSLAND MINERS' UNION.

*Pleading—Action against trade union—Defence of nul tiel corporation—Application to strike out pleadings—Costs—Appeal partly successful.*

Appeal from an order of MARTIN, J.

In an action against a labour union for damages in respect of the Rossland strike in 1901, the union pleaded that "they were not a company, corporation, co-partnership, or person, and not capable of being sued in this or any action."

*Held*, plea bad.

The defendants in their pleading also claimed the benefit of the provisions of the Trade Unions Amendment Act of 1902, and the plaintiffs applied to have the plea struck out, on the ground that it was embarrassing, as the Act was not retroactive.

*Held*, that questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing.

It is open to either party to an action up to the time of the trial to attack the other's pleadings.

An appellant who is substantially successful is entitled to the costs of appeal.

The fact that a respondent is successful in some parts is not sufficient to deprive an appellant who is substantially successful of his costs.

*A. C. Galt*, for the plaintiffs.

*S. S. Taylor*, K.C., for the defendants.

[FULL COURT, 16TH JUNE, 1908.]

*In re* DOBERER AND MEGAW'S ARBITRATION.

*Arbitration and award—Setting aside award—Misconduct of arbitrator—Waiver.*

Appeal from judgment of IRVING, J., setting aside an award on the ground of misconduct by an arbitrator.



A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award.

Where two out of three arbitrators go on and hold a meeting, and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator, and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards.

*Per* HUNTER, C.J.—It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was not fair in the conduct of one or more of the arbitrators.

Sir *C. H. Tupper*, K.C., and *W. M. Griffin*, for the appellant.

*J. H. Senkler*, for the respondent.

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[FULL COURT, 16TH JUNE, 1908.]

### HASTINGS v. LE ROI NO. 2, LIMITED.

*Master and servant—Negligence—Common employment—Mine owner and contractor.*

Appeal from the judgment of IRVING, J.

H. and M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc.; H. and M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request.

A hoisting bucket hung on a clevis was supplied to H. and M. by the defendants. and through the negligence of the defendants' superintendent, master mechanic, or shift boss, a hook substituted for the clevis by defendants, at the request

of H. and M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. and M.'s workmen engaged in sinking the winze.

*Held*, that the plaintiff, being subject to the orders and control of the defendants, was acting as their servant, and the doctrine of fellow-servant applied, and the action was not maintainable. Appeal allowed.

*E. P. Davis*, K.C., and *J. S. Clute*, for the appellants.

*A. H. MacNeill*, K.C., for the respondent.

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[FULL COURT, 22ND JUNE, 1908.]

REX v. LOUIE.

*Criminal law—Admissibility of evidence — Dying declaration — Indian woman—Consciousness of impending dissolution—Hearsay evidence to prove dying declaration.*

Crown case reserved. The question was as to the admissibility of a dying declaration.

Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way. A justice of the peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter, and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the justice of the peace then signed the statement. To some of the questions the woman indicated her answers by nodding her head.

At the trial the statement was tendered as a dying declaration, and the doctor, the justice of the peace, and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say.

*Held, per WALKER, DRAKE, and MARTIN, JJ.*, disapproving *Regina v. Mitchell*, 17 Cox C. C. 503, that the statement was admissible as a dying declaration; also that it had been properly proved.

An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration.

A dying declaration may be obtained by means of questions and answers, and if it is reduced to writing it is sufficient if the answers only appear in the writing.

*L. P. Duff*, K.C., and *A. D. Macintyre*, for the prisoner.

*H. A. Maclean*, for the Crown.

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[FULL COURT, 20TH JULY, 1908.]

HOPPER v. DUNSMUIR. ✓

*Discovery—Examination for—Scope of—Rule 703.*

Appeal from an order of *DRAKE*, J., refusing to strike out the defendant's defence, on the ground of his refusal to answer certain questions on his examination for discovery.

The action was to set aside the will of *Alexander Dunsmuir*, on the grounds of insanity and undue influence exercised by the defendant, who was the beneficiary under the will. On the examination for discovery of the defendant, he refused to answer questions in reference to the nature and extent of the subject-matter of the will, the business and personal relations that existed between him and his deceased brother, the history of their dealings with the property, the mode in which the deceased brother managed his affairs, and the circumstances leading up to and surrounding the execution of the will.

*Held*, that the questions must be answered or the defence would be struck out.

The examination for discovery under Rule 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues.

Appeal allowed.

*L. P. Duff*, K.C., and *H. D. Helmcken*, K.C., for the appellant.

*E. P. Davis*, K.C., and *A. P. Luxton*, for the respondent.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

MEREDITH, C.J.]

[14TH SEPTEMBER, 1903.]

EARLE v. BURLAND.

*Interest—Moneys of company improperly withdrawn—President and manager—Trustee—Statute of Limitations—Reference—Powers of Master.*

The appellant, who was for many years the president and general manager as well as the principal shareholder of an incorporated company, withdrew from the funds of the company, between the 1st August, 1889, and December, 1900, at the rate of \$5,025 per annum, as salary in addition to his regular salary. He assumed to do this under a resolution authorizing the payment of extra remuneration to the "staff," but it was held by the Court of Appeal (27 A. R. 340) and by the Judicial Committee ([1902] A. C. 83), that the resolution did not apply to him, and he was ordered to account for the moneys received during the whole period, notwithstanding a plea of the Statute of Limitations.

*Held*, that his position was that of a trustee for the company, and that he was chargeable with interest on the moneys received.

*In re Exchange Banking Co., Flitcroft's Case*, 21 Ch. D. 519, followed.

*Held*, also, that the Master upon a reference had power under Con. Rules 666 and 667 to charge the appellant with interest, although the judgment directing the reference was silent on the subject.

Judgment of MEREDITH, C.J., 1 O. W. R. 527, affirmed.

W. D. Hogg, K.C., and G. F. Shepley, K.C., for the appellant.

A. H. Marsh, K.C., and C. J. R. Bethune, for the plaintiffs.

ROBERTSON, J.]

[29TH JUNE, 1908.]

## McLAUGHLIN v. MAYHEW.

*Vendor and purchaser—Oral contract for sale and purchase of land—Specific performance—Statute of Frauds—Part performance—Possession—Note or memorandum—Delivery of deed in escrow.*

Specific performance of an oral contract for the sale and purchase of land was adjudged at the suit of the vendee, who had gone into possession of the land on the faith of the contract and openly and continuously for some time remained in visible possession by his tenants, to the knowledge of the vendors and without objection on their part. It was considered that, under the circumstances, possession should be assumed to have been taken with the assent of the vendors, and the possession was of such a character as to exclude the operation of the Statute of Frauds.

*Quære*, whether a conveyance of land defectively executed and delivered in escrow and retained in the vendor's own possession, to be handed to the vendee on payment of the purchase money, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed.

Judgment of ROBERTSON, J., 1 O. W. R. 308, affirmed.

*G. Lynch-Staunton*, K.C., for the appellant.

*W. H. Blake*, K.C., for the respondent.

STREET, J.]

[14TH SEPTEMBER, 1908.]

## CITY OF TORONTO v. BELL TELEPHONE CO. OF CANADA.

*Constitutional law—Telephone company—Work or undertaking connecting Provinces—Jurisdiction of Dominion Parliament—B. N. A. Act, s. 91 (39), s. 92 (10a)—Right to construct lines in streets—Effect of Provincial Act.*

The work or undertaking for the prosecution of which the defendants were incorporated by 43 V. c. 7 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces, or extending beyond the limits of the Province, within the meaning of the

exception *a.* in clause 10 of s. 92 of the British North America Act, and therefore falls within the exclusive legislative authority of the Parliament of Canada, under clause 29 of s. 91.

The powers conferred by the defendants' Act of incorporation, as amended by 45 V. c. 95 (D.), are not curtailed by the provisions of 45 V. c. 71 (O.), as regards the right to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisions set forth and contained in s. 3 of the Act of incorporation as amended; MACLENNAN, J.A., dissenting.

Judgment of STREET, J., 3 O. L. R. 465, 22 Occ. N. 142, reversed.

*W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood, for the appellants.*

*C. Robinson, K.C., and J. S. Fullerton, K.C., for the respondents.*

LOUNT, J.]

[29TH JUNE, 1908.]

ANDERSON v. ELGIE.

*Dower—Equity of redemption—Conveyance by husband alone—42 V. c. 22 (O.)—Discharge of mortgage—Effect of.*

On the 8th February, 1881, the owner of land subject to a mortgage, dated 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the moneys advanced upon the second mortgage were applied in payment of the first mortgage, and the first mortgagees executed a discharge, which was registered on the 5th March, 1881. On the 30th September, 1881, the owner executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar her dower. Neither the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the mortgagees in the exercise of the power of sale on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th September, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of 30th September, 1881, brought this action for dower on the 11th September, 1902.

*Held*, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 V. c. 22 (O.), which became law on the 11th March, 1879.

2. The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to revest the premises in the mortgagor, but in the second mortgagees.

Judgment of LOUNT, J., 1 O. W. R. 550, 638, reversed.

*R. Bayly*, K.C., for the appellant.

*J. Bicknell*, K.C., for the respondent.

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## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MACMAHON, J., 11TH JUNE, 1903.]

*In re* DENISON.

REX v. CASE.

*Mandamus—Police magistrate—Sentence—Ontario Liquor Act, 1902—Voting on—Personation—Information—Deputy returning officer—Prosecutor—Applicant for mandamus—Status.*

At the voting upon the Ontario Liquor Act, 1902, the defendant presented himself at a polling place and asked for a ballot in the name of another person, whereupon, before the defendant had left the polling place, one Stewart laid an information before the deputy returning officer charging the defendant with personation, and on this information the deputy issued his warrant, under which the defendant was arrested and brought before a police magistrate. The deputy then laid an information against the defendant for personation, and the defendant was tried by the magistrate, convicted, and sentenced.

*Held*, affirming the decision of BRITTON, J., in the Weekly Court, that, having regard to the provisions of R. S. O. 1897 c. 10 (made applicable by s.-s. (5) of s. 91 of the

Ontario Liquor Act, 1902), the information which gave the magistrate jurisdiction was that laid by Stewart; and the deputy returning officer had no status to apply for a mandamus to the magistrate to impose a different sentence.

*Per* BRITTON, J., that a mandamus could not be granted for that purpose.

*A. Mills and W. E. Raney*, for the applicant.

*J. Haverson*, K.C., for the defendant.

[BOYD, C., FERGUSON, J., MACMAHON, J., 17TH JUNE, 1903.

✓

REX v. COULTER.

*Criminal law—Procuring personation of voter—Ontario Liquor Act, 1902—Ontario Election Act, 1902, ss. 167, 168—Procuring person to vote knowing that he has no right.*

The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day, upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question.

*Held*, that the conviction was justified under s. 168 of the Ontario Election Act, R. S. O. 1897 c. 9 (made applicable by s. 91 of the Liquor Act), although the evidence shewed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a voter at such polling place. Section 167 (1) makes the counselling or procuring of personation a corrupt practice, but does not provide a punishment; and s. 168 is in terms wide enough to cover the offence.

*J. Haverson*, K.C., for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

[BOYD, C., FERGUSON, J., MACMAHON, J., 22ND JUNE, 1903.

✓

REX v. MYERS.

*Municipal corporations—By-law—Transient traders—Conviction—Penalty—Costs—Distress—Imprisonment—Uncertainty as to time and place—Amendment—"Butcher."*

Upon motion to quash the conviction of the defendant, a transient trader, for offering meat for sale in quantities less



than the quarter carcase, without having paid a license fee, contrary to a by-law of a village:—

*Held*, that it was not necessary that the by-law or conviction should contain the words “for temporary purposes” and “assessment roll for the *then* municipal year,” as they relate to the regulation of transient traders under clause 30 of s. 583 of the Municipal Act, R. S. O. 1897 c. 223, which refers to the payment of a license fee before beginning operations; nor was it necessary to refer to or negative the provisions of 58 V. c. 42, s. 22 (O.), making the term “transient trader” applicable to one who has resided less than three months in the municipality before beginning business, the evidence shewing brief visits periodically and regularly to sell meat for a given time at a particular place in the village.

2. The objection that the penalty of \$1 was not apportioned under s. 708 failed, because the application was otherwise provided for by the by-law.

3. The objection that the conviction and by-law were in excess of the statute because power of distress was given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, was not well taken, having regard to the powers given by s. 702, s.-ss. 2 and 3.

4. The uncertainty of the offence in the conviction as to date, place, and meat sold, should be cured by amendment, upon the facts in evidence, under 2 Edw. VII. c. 12, s. 15 (O.)

5. Although ss. 580 and 581 deal specifically with the sale of meat, a transient trader, under s. 583, might include a butcher or dealer in meat.

*J. W. McCullough*, for the defendant.

*W. E. Middleton* and *C. R. Fitch*, for the magistrate and complainant.

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[BOYD, C., FERGUSON, J., MACMAHON, J., 18TH JULY, 1908.]

### ✓ REX v. LAIRD.

*Intoxicating liquors—Liquor License Act—Powers of license commissioners—Resolution prohibiting games of chance in licensed premises—“Euchre”—Knowledge of licensee—Conviction—Form—Distress—Imprisonment—Costs.*

A board of license commissioners, under the authority of the Liquor License Act, R. S. O. 1897 c. 245, s. 4, s.-s. 4, passed a resolution “that no gambling or any game of chance

whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises."

*Held*, MACMAHON, J., dissenting, that the powers of the commissioners under s. 4 were not restricted by s. 81, and that the resolution was within their powers.

Four persons played "euchre" for amusement in a room behind the bar of the defendant's hotel, the cards used being the property of one of the players, a boarder in the hotel.

*Held*, that "euchre" is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge.

*Held*, also, that s. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress and in default of distress imprisonment, was authorized.

*Held*, also, that where the license inspector attends Court as prosecutor he is to be allowed certain expenses by way of costs, as provided in s. 117, and there was nothing wrong in the amount (\$4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction.

*J. R. Cartwright*, K.C., for the license inspector.

*T. A. Gibson*, for the defendant.

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[FERGUSON, J., McMAHON, J., 18TH JULY, 1903.]

### McGILLIVRAY v. MUIR.

*Justice of the peace—Penalty—Excessive fee—Information for indictable offence—Pleading—Amendment.*

An information having been laid by the plaintiffs before the defendant, a justice of the peace, for an indictable offence under ss. 210 (2) and 215 of the Criminal Code, over which the defendant had no summary jurisdiction as a justice:—

*Held*, that he was not entitled to any fee whatever, and that the plaintiffs, while they were entitled to recover by action the amount of the fee which they paid, could not maintain an action under s. 3 of R. S. O. 1897 c. 95, or under s. 902, s.-s. 6. of the Criminal Code, to recover a penalty from

the defendant for receiving a larger amount of fees as a justice of the peace than he was entitled to.

*Bowman v. Blyth*, 7 E. & B. 26, applied and followed.

It was alleged by the statement of claim that the defendant wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiffs the sum of, etc., contrary to the Ontario Act. At the trial the plaintiffs were allowed to amend by substituting "wilfully" for "maliciously and without reasonable or probable cause," and by making an alternative claim under s. 902, s.-s. 6, of the Criminal Code.

*Held*, that the amendments were properly made.

*J. Idington*, K.C., for the plaintiffs.

*T. Dixon*, for the defendant.

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[MEREDITH, C.J., MACLAREN, J.A., 14TH SEPTEMBER, 1908.]

*In re O'SHEA.*

*Will—Construction—Devise—Direction to keep and maintain.*

A testator directed his two sons to keep their two sisters until they married, in a suitable manner free of expense, and that so long as the sisters, or either of them, kept house for their brothers, they or she were to have control of the poultry, eggs, butter, etc., and all moneys thence derived, for their own use and benefit.

He devised his farm, on which he was residing at his death, to the sons, who were compelled to sell it, as it was heavily incumbered.

*Held*, that all the sons were bound to do, was to offer to support and maintain the sisters, free of expense, in a suitable manner, either on the farm devised, or in the home of either of them, but that they were not bound to allow the sisters to reside wherever the latter wished, and to pay the cost of their maintenance.

*R. R. Hall*, for Susannah O'Shea.

*G. Edmison*, K.C., for the executors.

[BOYD, C., 24TH JUNE, 1908.]

## ATTORNEY-GENERAL v. CITY OF TORONTO.

*Municipal corporations—Establishment of park—By-law—Dedication of land held by corporation in fee—Subsequent leases for building purposes—Injunction—Private plaintiff—Interest.*

A by-law was passed by the defendant corporation in 1880 purporting to establish a park on the "Island," which was granted to the corporation by the Crown in fee in 1867, and certain lots were designated therein which, "with such other lands as may hereafter be obtained from lessees or otherwise," were to form a park. Other lands were in 1887 directed to be taken and expropriated in order to enlarge the "Island Park," but no general plan or scheme for park improvements was considered till 1901, when a special committee was appointed to elaborate a plan. The defendant corporation from 1880 till 1901 acted on the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rent and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners. The park scheme was not abandoned, but the details and the area were modified from time to time by successive councils.

*Held*, that the corporation had not exceeded their powers in so dealing with the land designated. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee. The fact of corporate action being embodied in a by-law implies its revocability.

*Held*, also, that S., who was joined as a plaintiff, claiming under a lease made prior to the park scheme, and renewed in 1895, after registration of plans made in 1883 and 1890, which shewed that the corporation had sanctioned the subdivision of the lands in question into building lots, had not such an interest, by reason of a special grievance, as would entitle her to have the corporation restrained from granting to the defendant L. a building lease of part of the lands in question.

*J. T. Small*, for the plaintiffs.

*J. S. Fullerton*, K.C., and *W. C. Chisholm*, for the defendant corporation.

*Frank Denton*, K.C., for the defendant Lemon.

*Judgment of Meredith, J. affirmed, Court being divided -  
25, B. L. S. 17.*

[MEREDITH, C.J., 27TH JULY, 1908.]

**FARMERS' LOAN AND SAVINGS CO. v. PATCHETT.**

*Covenant—Assignment of mortgage—Covenant by assignor for payment of mortgage—Discharge of part of land mortgaged—Principal and surety—Release of assignor.*

The defendant, when assigning a mortgage to the plaintiffs upon a certain lot of land, covenanted with the plaintiffs that the mortgagee would duly pay the mortgage money. The plaintiffs afterwards, without the consent of the defendant, discharged the south half of the lot from the mortgage, in consideration of a payment of half the principal money with interest.

*Held*, that, as the defendant occupied the position of surety for the performance by the mortgagor of his covenant to pay the mortgage money, the release by the plaintiffs of the south half of the lot without his consent, was such an alteration of the contract guaranteed as to release him from his liability, although the amount paid as consideration for the release may have been the full value of the part released, and the security of the mortgagee may have been not lessened, or in any way impaired.

*W. M. Douglas, K.C.*, for the plaintiffs.

*W. H. Irving*, for the defendant Coleman.

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[MEREDITH, C.J., 27TH JULY, 1908.]

**CROSSETT v. HAYCOCK.**

*Dower—Action for—Bar by deed executed by married woman during infancy—Purchaser for value—R. S. O. 1897 c. 165, s. 5.*

Action to recover dower in lands of which the plaintiff's husband had been owner in fee simple, but which he had conveyed away in his lifetime, the plaintiff joining and barring her dower. The plaintiff contended that, as she was an infant when she joined in the deed, the bar of dower did not bind her. The grantee in the deed was the son of the plaintiff's husband by a former wife, and it appeared that the land had been conveyed to him in pursuance of an agreement between him and his father, that if he would work the land with his father for the next ensuing season, which he accordingly did, the father would convey the land to him.

*Held*, that the grantee was a purchaser for value of the lands, and that therefore, by virtue of s. 5 of the Married Woman's Real Estate Act, R. S. O. 1897 c. 165, the infancy of the plaintiff when she barred her dower was of no consequence.

*W. R. Riddell*, K.C., and *V. Sinclair*, for the plaintiff.

*G. F. Mahon*, for the defendant.

[FALCONBRIDGE, O.J., 1ST SEPTEMBER, 1908.]

### IDINGTON v. DOUGLAS.

*Landlord and tenant—Expiry of lease—Continuance of possession by tenant—Special agreement—Tenancy at will.*

The reservation or payment of rent in aliquot proportions of a year, is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shewn to repel the implication.

*Held*, therefore, in this case, where the landlord, before he accepted any rent after expiry of the lease, expressly told the tenant that he would not consent to any tenancy from year to year, so as to require any notice of termination to be given, but that they should remain in the same position as they were on the expiry of the lease, to which the tenant assented—the rent, however, to be the same as that reserved in the lease, and to be paid in like manner—the tenant was not a tenant from year to year, but a tenant at will.

*R. S. Robertson*, for the plaintiff.

*J. P. Mabee*, K.C., and *G. G. McPherson*, K.C., for the defendant.

[FERGUSON, J., 23RD JULY, 1908.]

### CHARLTON v. BROOKE.

*Gift—Donatio mortis causa—Evidence—Moneys and notes—Delivery of keys of box.*

The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly

ill, retired to his room and lay down on his bed, and while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, and said "All the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk.

There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant. She retained the keys until his death.

In an action by the administrators of his estate for the money and notes:—

*Held*, that there was a good *donatio mortis causa*.

*In re Mustapha, Mustapha v. Wedlake*, 8 Times L. R. 160, followed.

*J. M. Glenn, K.C.*, and *C. St. Clair Leitch*, for the plaintiffs.

*Talbot Macbeth, K.C.*, for the defendant.

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[FERGUSON, J., 9TH SEPTEMBER, 1908.]

### BRIDGE v. JOHNSTON.

*Indian lands—Assignment of timber—Interest in land—Registration—Conditional assignment—Priorities—Actual notice.*

The owner of unpatented Indian lands administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R. S. C. c. 43, made a sale of certain timber thereon and executed an assignment or transfer to the vendee, by which the vendor agreed to sell and the vendee to purchase all the timber of a certain specified kind upon the land described, for a named price, payable as set out, and by which the vendee was "to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term."

*Held*, that the interest assigned was an interest in land, and not a mere chattel interest.

*Summers v. Cook*, 28 Gr. 179, and *Ford v. Hodgson*, 3 O. L. R. 526, followed.

*Held*, also, that the assignment was not an unconditional assignment within the meaning of s. 43 of the Indian Act,

and was incapable of being registered in the manner prescribed by the Act, and therefore did not require registration to preserve its priority, and was entitled to priority over a subsequent registered assignment.

*Harrison v. Armour*, 11 Gr. 303, followed.

*Semble*, that, although there is no provision in the Indian Act as to "actual notice," the law laid down in *Agra Bank v. Barry*, L. R. 7 H. L. at pp. 147, 148, would apply if the subsequent assignee had at the time of the registration such notice of the prior assignment.

*David Robertson*, for the plaintiff.

*C. S. Cameron*, for the defendant.

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[MEREDITH, J., 31ST JULY, 1908.]

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*In re ASSELIN AND CLEGHORN.*

*Receiver—Equitable execution—Judicature Act, s. 58, s.-s. 9—Property to be reached—Book debts—Shares in foreign company—Insurance policy.*

The provision in s. 58, s.-s. 9, of the Judicature Act, R. S. O. 1897 c. 51, that a receiver may be appointed in all cases in which it shall appear to be just or convenient that such order should be made, was intended merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone.

*Held*, that a judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another, assigned to the debtor.

*W. J. Elliott*, for the judgment creditor.

*W. N. Tilley*, for the judgment debtor.



## MANITOBA.

## In the King's Bench.

[FULL COURT, 11TH JULY, 1908.]

*In re* COTTER.*Mortgage—Power of sale. without notice.*

Appeal from a decision of a district registrar, under the Real Property Act.

C. D. Anderson made a mortgage of lands which contained the following clause:—

“Provided that the company on default of payment for one calendar month may on one week's notice enter on and lease or sell the said lands. The company may lease or sell as aforesaid without entering into possession of the lands. Should default be made for two months a sale or lease may be made hereunder without notice. . . . No want of notice or of publication when required hereby shall invalidate any sale hereunder.”

Default occurred and continued for over two months, and the company, without giving any notice to the mortgagor, sold the land to Cotter, purporting to make such sale under the powers contained in the mortgage. After the making of the mortgage, but before the sale to Cotter, the land had been brought under the Act.

The district registrar refused to register Cotter as owner, holding that the clause in the mortgage did not fall within the Short Forms Act, and had not embodied in it the exponential clauses of that Act, and that the words in themselves were not sufficient to empower the mortgagee to sell without giving notice of intention to exercise the power of sale.

Cotter appealed and the appeal was referred to the Court in Banc.

*Held*, that the prayer of the petition should be granted, and the district registrar ordered to register the petitioner Cotter as owner of the lands in question, notwithstanding that notice of intention to exercise the power of sale was not given to the mortgagor.

*J. A. M. Atkins*, K.C., and *E. Loftus*, for the petitioner.

*C. P. Wilson*, for the district registrar.

[RICHARDS, J., 21st AUGUST, 1908.]

DUNSFORD v. WEBSTER.

*Landlord and tenant—Farm lease—Implied covenant to cultivate and crop  
—Damages for non-cultivation and deterioration of land.*

In April, 1898, the plaintiff leased to the defendant's husband a half section of land for five years, yielding and paying therefor the clear yearly rent or sum of one-third of the crop. The lease contained covenants by the lessee that he would cultivate in a good husbandlike and proper manner so as not to impoverish or injure the soil, and plough and crop the same in a proper farmer-like manner.

Afterwards a new lease was made substituting the defendant as lessee, instead of her husband. In drawing the first lease a farm lease was used, in the second a "statutory lease" was used, which form did not contain any of the above mentioned covenants, or anything specially applicable to leases of farms, but contained the following: "Yielding and paying therefor yearly and every year during the said term . . . the sum of one-third of the crop grown, to be payable, . . . the first of such payments to become due and to be made when threshed in the fall of each year."

The second lease contained a covenant to plough in each year of the term four inches deep, which was written into it. It did not contain express covenants to cultivate or crop.

In 1901 the cultivated land was 117 acres; in 1902 the defendant ploughed and cultivated only four acres of the 117, and in the remainder weeds grew up, which the defendant did not destroy.

The plaintiff sued for breach of covenants to cultivate, crop, and plough in 1902, and asked damages for the loss of his share of the crop which would have been deliverable to him if the defendant had cultivated and cropped in 1902, and damages for alleged deterioration in value of the land resulting from its not being cultivated and ploughed.

The defendant alleged that by the end of 1901 the land had been cropped for so many successive seasons that it would not have been good husbandry to crop it in 1902, and that it then needed a year's rest.

One witness estimated the damage suffered in the deterioration in value of the land through being allowed to grow up in weeds at from \$300 to \$500.

*Held*, that there should be judgment for the plaintiff for deterioration in value of land from defendant's omitting to

plough, cultivate, and crop in 1902, \$300, and for loss of wheat, barley, and oats \$291.76, in all \$591.76.

Implied covenants to cultivate and crop in each year should be read into the second lease: *McIntyre v. Belcher*, 14 C. B. N. S. 654; *Hamlyn v. Wood*, [1891] 2 Q. B. 491.

The main, if not the entire, object of both parties in entering into the second lease, as well as the first, was the getting from the lessee's cultivation and cropping of the land a yearly crop from which each party would profit. The defendant bound herself to plough four inches deep in each year. That must mean that she would plough for the purpose of cultivating and cropping. The wording of the provision as to the payment to the lessor of a third of the crop in each year, would imply that a crop was to be grown in each year of the term.

*H.M. Howell*, K.C., and *T. G. Mathers*, for the plaintiff.

*C. P. Wilson* and *T. H. Metcalfe*, for the defendant.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 16TH JUNE, 1908.]

#### GUNN v. LE ROI.

*Master and servant—Injury to servant—Employers' Liability Act—Dangerous place—Duty to warn workmen.*

G. had been working in the defendants' mine on the floors immediately below the 600-foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape, and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred, and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600-foot level, of which the superintendent was aware and G. not aware. The jury found that the superintendent was negligent, inasmuch as he did not advise G. of the probable danger.

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*Held*, in an action under the Employers' Liability Act, that the defendants were liable.

Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment, and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger.

Judgment of IRVING, J., affirmed.

*E. P. Davis*, K.C., for the appellants.

*A. H. MacNeill*, K.C., for the respondent.

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[HUNTER, C.J., 21ST JANUARY, 1908.]

### HINTON ELECTRIC CO. v. BANK OF MONTREAL

*Bills and notes—Stamp Act, 1853, s. 19 (Imp.)—Application to British Columbia—Bills of Exchange Act—Intention of—Company—Cheques—Powers of manager.*

A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that bank:—

*Held*, that the Bank of Montreal were liable to the company for the amount of the cheques so cashed.

Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act.

Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act.

The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques, and promissory notes.

*Sir C. H. Tupper*, K.C., and *M. Griffin*, for the plaintiffs.

*C. Wilson*, K.C., and *E. Bloomfield*, for the defendants.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

MEREDITH, C.J.] ✓

[19TH SEPTEMBER, 1908.

REX v. NOEL.

*Criminal law—Evidence—Right to re examine witness.*

The right to re-examine follows upon the exercise of the right to cross-examine, and, even if inadmissible matter be introduced in cross-examination, the right to re-examine remains, and the rule holds good where the witness volunteers the statement. If it be desired to avoid re-examination upon such matter, it must be expunged at the instance of the party cross-examining; while it remains as part of the testimony, the right to re-examine upon it also remains.

Ruling of MEREDITH, C.J., at the trial, reversed; and a new trial ordered.

*E. E. A. Du Vernet*, for the prisoner.

*J. R. Cartwright*, K.C., for the Crown.

FALLOONBRIDGE, C.J.]

[29TH JUNE, 1908.

GRIFFITHS v. HAMILTON ELECTRIC AND CATARACT  
POWER CO.

*Master and servant—Injury to servant—Death from electrical shock—  
Dangerous place—Absence of direct evidence as to cause of death—  
Inference—Evidence to submit to jury—Negligence—New trial.*

The plaintiff's son and another labourer were directed to clear up and remove the rubbish caused by their cutting a trench in the concrete floor of an alleyway in the defendant's power house. The alleyway was crossed at right angles with others, on each side of which were electric machines and live wires within arm's length of any one working in the trench,

one of the latter of which was ruptured, perhaps by bending in constant use. The other labourer went into a cross alleyway where the live wires were, although there had been a slat nailed across it when the two were put to work; and was sweeping towards the trench the litter that had been scattered about, when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switchboard, plaintiff's son being dead. It was shewn that there was a rupture in the insulation of a loose loop or cable hanging from the switchboard directly over where the survivor was lying, and that the insulation of the wires was, with respect to the voltage passing, insufficient for the safety of anyone working among them, and that the hanging loop might easily have been better guarded than it was.

*Held*, that there was evidence which could not be properly withdrawn from the jury, and a nonsuit was set aside, and a new trial ordered.

Judgment of FALCONBRIDGE, C.J., reversed.

*G. Lynch-Staunton*, K.C., for the plaintiff.

*M. Brennan*, for the defendants.

LOUNT, J.]

V

[14TH SEPTEMBER, 1903.]

### SKILLINGS v. ROYAL INSURANCE CO.

*Fire insurance—Cancellation—Statutory conditions—Notice of cancellation received after loss.*

The judgment of LOUNT, J., 4 O. L. R. 123, 22 Occ. N. 258, affirmed on appeal.

*Held*, per MACLENNAN, J.A., that an actual delivery of notice was what was intended by statutory condition 19 (a) R. S. O. 1897 c. 203, s. 168; and s. 43 of the Post Office Act, R. S. C. c. 35, was not intended to alter the actual rights of the sender and the person addressed, as between themselves.

*Per* GARROW, J.A., that the notice may be recalled at any time before it reaches its statutory home, by direct or indirect interference on the part of the insured, even by the erroneous address upon the letter retarding its delivery; and a notice sent before and not received until after the fire was wholly ineffectual.

*Crown Point Iron Co. v. Aetna Insurance Co.*, 127 N. Y. (Hun) 603, cited with approval.

*C. Robinson*, K.C., and *C. S. MacInnes*, for the defendants.

*W. R. Riddell*, K.C., and *A. Fasken*, for the plaintiffs.

## HIGH COURT OF JUSTICE.

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[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 16TH JULY, 1903,  
RUSHTON v. GRAND TRUNK R. W. CO.

*Evidence—Depositions of witnesses—Use on motion for new trial—Contradicting evidence given at trial—Appointment for examination—Setting aside—Divisional Court—Jurisdiction—Reference of motion—Agreement of parties.*

The plaintiff, having given notice of motion for a new trial on the ground of surprise, in that certain witnesses, called for the plaintiff, had withheld evidence which they could have given in his support at the trial, and were willing to give such evidence if a new trial were granted, subpoenaed three of these witnesses under Rule 491, for examination before a local registrar upon the motion for a new trial. The defendant moved before the Master in Chambers to set aside the subpoena and appointment. The Master referred the motion to a Divisional Court.

*Held*, that Rule 491 applies to motions for a new trial pending before a Divisional Court.

*Held*, however, that evidence of persons who had been witnesses at the trial, that the evidence they then gave was not in fact true, and that certain statements made by them before trial to the plaintiff's solicitor (which was avowedly the evidence sought to be obtained here by the examination in question) were true, would not be receivable, and therefore the subpoena and appointment should be set aside.

The Master in Chambers has no power to refer a motion before him to a Divisional Court, but the Court may properly hear a motion so referred, if both parties agree to its being heard.

W. R. Riddell, K.C., for the defendants.

Shirley Denison, for the plaintiff.

[OSLER, J.A., 22ND JULY, 1903.

✓ —  
GARDNER v. PERRY.

*Trusts and trustees—Will—Action by new trustees against representatives of former trustee—Misappropriation by co-trustee—Limitation of actions—Trustee Act, s. 32, s. s. 1 (b)—Bar—Counterclaim—Lease by tenant for life—Covenants as to straw and manure—Property in—Emblements.*

R. G. died in 1870, having by his will given the income of his estate to his widow for life, and, subject to certain

bequests, the residue to the children of his brothers and sisters, and appointed T. H., J. G., and the widow executors and executrix of his will, with power "to dispose of the property if they see fit." J. G. managed the estate until the time of his death in 1885, by which date some of the real property had been disposed of and invested, and his management was duly accounted for. T. H. then took the management of the estate until 1895, when the widow, after much pressure by her friends, took proceedings against him for an account, the result of which was that he was found largely indebted, and a large sum was lost to the estate. The widow died in 1902; probate of her will was then granted to the defendants; and T. H. was removed as trustee, and the plaintiffs appointed in his place.

In an action by the plaintiffs against the defendants in 1903 to compel them to make good the losses to the estate of R. G. occasioned by the negligence of the widow in permitting her co-executor to misappropriate the funds of the estate:—

*Held*, that, as all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, s. 32 (1) (b) of the Trustee Act, R. S. O. 1897 c. 129, was a good defence.

*In re Bowden, Andrew v. Cooper*, 45 Ch. D. 447, followed.

During the widow's lifetime two of the farms belonging to the estate were leased for five years, dependent on her living so long, and the lessees covenanted to cultivate, till, manure . . . and to spend, use, and employ in a proper husbandlike manner all the straw and manure . . . and not to remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, and to carefully stack the straw . . . and turn all the manure thereon into a pile (so it may heat and rot so as to kill and destroy foul seeds), and thereafter and not before to spread the same on the land.

*Held*, that the defendants were not entitled to the straw and manure as emblements, as the widow was not in actual occupation of cultivation of the lands on which it was produced.

*Held*, also, that the lessees would have been entitled to the straw and the manure, which had been piled into heaps, but for their covenants, which precluded them from making any claim; and that the covenants might be construed or held to operate as a reservation of the straw and manure to the lessor to be dealt with in the stipulated manner, and, as the lessees' right or power and obligation so to deal with it came to an end with the death of the lessor, it passed to her representatives unrestricted thereby.



*Snetsinger v. Leitch*, 32 O. R. 440, referred to.

*E. E. A. DuVernet* and *R. E. Heggie*, for the plaintiffs.

*G. F. Shepley*, K.C., and *E. G. Graham*, for the defendants.

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IN CHAMBERS.

[MEREDITH, C.J., 24TH JULY, 1908.]

*In re* **MACKEY.**

Will—Bequest of bonds—Specific or demonstrative—Succession duty.

A testator possessed both at the time of making a codicil to his will and at the time of his death of a considerable number (more than 5) of \$1,000 debentures, bearing interest at four per cent., of a certain city, by the codicil devised to each of two devisees "one debenture of (the city) for the sum of \$1,000, bearing interest at four per cent. per annum," and directed "that, if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture of (the city) for the sum of \$1,000, bearing interest at four per cent.

Held, that the legacies to the two legatees were not specific legacies; and that, even if they had been, the legatees were not entitled to receive them free of succession duty, and the executors should either deduct or collect the duty before paying them the legacies.

*M. J. Gorman*, K.C., for the executors.

*W. D. Hogg*, K.C., for the residuary legatees.

*D'Arcy Scott*, for the legatees in question.

*R. G. Code*, for other legatees.

*J. C. Grant*, for Henry Mackey.

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[MEREDITH, C.J., 27TH JULY, 1903.]

**McINTYRE v. MUNN.**

Summary judgment—Rule 603—"Debt or liquidated demand"—Contract—Claim for money advanced after deduction for timber supplied—Absence of ascertainment.

The defendant, having entered into an agreement to manufacture for and deliver timber to the plaintiff, received

from him certain advances in money, exceeding the value of the timber actually delivered, and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained.

In an action to recover the balance of the advances overpaid:—

*Held*, that the claim was not a debt or liquidated demand within the meaning of Con. Rule 138, and an order of a local Judge giving leave to sign judgment under Con. Rule 603 was set aside.

*G. H. Kilmer*, for the defendant.

*M. H. Ludwig*, for the plaintiff.

[MEREDITH, J., 31st JULY, 1903.]

### REX v. GILMORE.

*Criminal law—Prosecution for crime—Right of private prosecutor to take part in proceedings.*

*Held*, on motion for a *certiorari*, that, though it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, and cannot insist that he, or counsel retained by him, shall aid in the conduct of the prosecution.

*W. H. Bartram*, for the private prosecutor, *ex parte*.

[MEREDITH, J., 31st JULY, 1903.]

### In re BRADLEY.

*Devolution of Estates Act—Sale of lands by administrator—Non-concurring adult heirs—Approval of official guardian.*

Application for a direction to the official guardian to approve of a sale of certain lands, made by the applicant as administrator of his deceased brother's estate, there being heirs who were *sui juris*, but had not concurred in the sale. The application was made under s. 16 of the Devolution of Estates Act, R. S. O. 1897 c. 127, as amended by 63 V. c. 17, s. 17, which gives the official guardian power to approve the sale in such a case, as in the case of infants. There appeared to be no express objection to the sale by any of the

heirs, but their concurrence had not been sought, because of the delay and expense which that would involve.

*Held*, that, under the facts of this case, the proper course was for the official guardian to make the usual inquiries, and if no good reasons were advanced or discovered for withholding his approval, it should be given.

*T. G. Meredith*, K.C., for the applicant.

*F. W. Harcourt*, official guardian.

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## NOVA SCOTIA.

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### In the Supreme Court.

[McDONALD, C.J., 21ST SEPTEMBER, 1903.]

#### MACDONALD v. MILLER.

*Partnership—Dissolution—Agreement for transfer—Goodwill—Breach of agreement—Customers—Advertising—Use of name—Injunction.*

The plaintiff and defendant carried on business in the city of Halifax, under the firm name of Miller Bros. and Macdonald. In 1902 the partnership was dissolved by agreement, whereby all the interest of the defendant in the firm business was transferred to the plaintiff, "together with the goodwill, firm name," etc., and "including every matter and thing in which the co-partnership money of the said Miller Bros. & Macdonald has been placed or invested." It was also agreed that the defendant should not "carry on business under said name or in any way interfere" with the use of such name by the plaintiff. The defendant subsequently went into business as "Miller Bros. & Co.," and published a circular in the papers advertising the fact "for the benefit of my old customers." The plaintiff brought this action for an injunction.

*J. A. McKinnon*, for the plaintiff.

*H. B. Stairs*, for the defendant.

McDONALD, C.J.—It appears to be settled by the case of *Labouchere v. Dawson*, L. R. 13 Eq. 322, approved in the House of Lords in *Trego v. Hurst*. [1896] A. C. 7, that the vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up in business of the same kind either in the same neighbourhood or elsewhere, and may publicly advertise the fact that he has

done so, but he must not solicit the customers of the old business to cease dealing with the purchaser or to give their custom to him. The circular of the defendant is a direct appeal to the customers of the old firm as well as the general public; it comes within the decision in *Labouchere v. Dawson*, and an injunction will be granted. The adoption of the name of Miller Bros. & Co., a name so similar to the one prohibited, is an interference with the name assigned to the plaintiff, and the defendant must be restrained from using that name.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 7TH AUGUST, 1902.]

#### JACKSON v. CANNON.

*Company—Security taken bona fide—Holder of—Necessity to inquire as to regularity of proceedings—Liquidator suing in his own name—Liability for costs.*

Appeal from judgment of MARTIN, J.

A person who *bona fide* takes a security in the ordinary course of business from an incorporated company, is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly.

In this respect a shareholder stands on the same footing as a stranger.

Where an action is brought by the liquidator of a company in liquidation, in his own name, he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect.

*Appeal dismissed.*

Sir C. H. Tupper, K.C., and F. Peters, K.C., for the appellant.

Joseph Martin, K.C., for the respondent.

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[FULL COURT, 28TH JANUARY, 1903.]

#### HOSKING v. LE ROI No. 2, LIMITED.

*Master and servant—Common employment—Former servant's negligence—Employers' Liability Act—Trial—Party bound by course of.*

Appeal from judgment of MARTIN, J., dismissing the plaintiff's action for damages for personal injuries.

Where a party frames an action for negligence at common law and also under the Employers' Liability Act, but at the trial attempts to develop a case at common law and fails, he will not be granted a new trial in order to try to establish a case under the Employers' Liability Act.

The jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers, who were competent, and who had left the defendants' employment before the injured person entered their employment.

*Held*, that the defendants were not liable either under the Act or at common law.

*Per* IRVING, J.—The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service.

*Appeal dismissed.*

*S. S. Taylor*, K.C., for the appellant.

*E. P. Davis*, K.C., for the respondents.

[FULL COURT, 9TH APRIL, 1908.]

*In re* IBEX MINING AND DEVELOPMENT CO. OF SLOCAN.

*Company—Winding-up—Mechanic's lien—Priority—Jurisdiction of Court to order—Notice to parties affected—Order made without jurisdiction—Substantive proceeding or appeal from.*

The holders of mechanics' liens filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in a County Court on the day on which the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of Holmes, a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid: the liquidator applied to the Court for leave to accept the proposal, and an order was made, without notice to the lienholders, giving Holmes a first charge on the claims for his debt, and the amount advanced by him: afterwards, on

Holmes's application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge.

The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that they be declared to have priority over Holmes.

*Held*, reversing the order of DRAKE, J., dismissing the application, that the order giving Holmes priority over the lien-holders was made without jurisdiction, and the lien-holders were not bound by it.

*F. Peters*, K.C., for the appellants.

*L. P. Duff*, K.C., for Holmes.

*G. H. Barnard*, for the liquidator.

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[FULL COURT, 28TH APRIL, 1903.]

**YORKSHIRE GUARANTEE AND SECURITIES CORPORATION v. COOPER.**

*Execution—Exemption under Homestead Act—Thing seized of a value over \$500.*

Appeal from judgment of HENDERSON, Co.J., in an interpleader issue.

*Held*, affirming the judgment appealed from, that the execution debtor was entitled, as an exemption under the Homestead Act, to \$500 out of \$1,000 realized by the sheriff on the sale of a steamship, the only exigible personalty of the debtor.

*Vye v. McNeill*, 3 Brit. Col. L. R. 24, approved.

*Semble*, that notice of claim of exemption is necessary.

*L. G. McPhillips*, K.C., for the appellant.

*Joseph Martin*, K.C., for the respondent.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

MACLENNAN, J.A.]



[29TH JUNE, 1908.]

*In re* NORTH GREY PROVINCIAL ELECTION.

BOYD v. MACKAY.

*Parliamentary elections—Controverted election petition—Neglect to leave copy with local registrar—Necessity for leaving—Statutes and Rules—Dismissal of petition—Extension of time—Terms—Costs.*

Election petitions filed with local registrars under 62 V. (2) c. 6 (O.) are received by them as registrars of the Court of Appeal.

And, although a petitioner who does not leave with the local registrar at the time of filing the petition a copy of the petition to be sent to the returning officer, is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And where, through inadvertence, the solicitor for a petitioner had omitted to leave the copy, and applied without delay, the time was extended, and an order for the dismissal of the petition was discharged, upon terms as to costs.

Order of MACLENNAN, J.A., reversed.

*I. F. Hellmuth*, K.C., for the petitioner, appellant.

*R. A. Grant*, for the respondent.

FALCONBRIDGE, C.J.]

[16TH OCTOBER, 1908.]

*In re* TOBIQUE GYPSUM CO.

*Company—Winding-up—Staying proceedings in another Province—Setting aside sale of foreign land—Summary proceedings—R.S.C. c. 129, s. 13.*

There is jurisdiction under s. 13 of the Dominion Winding-up Act, R. S. C. c. 129, to restrain proceedings in any

action, suit, or proceeding against the company, even in actions or suits beyond the ordinary territorial jurisdiction of the Court; and the enforcing of an execution is a proceeding within this section; and therefore there was jurisdiction for the Court in this Province to make an order staying proceedings under an execution in the hands of the sheriff of the county of Victoria, in the Province of New Brunswick, as had been done in this case.

But the sheriff having, notwithstanding, proceeded with the sale under the execution against lands of the company, and executed a deed of the same to the purchaser:—

*Held*, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void, such a case not coming within the classes of cases which, under the Act, may be dealt with in a summary manner by a Judge in the winding-up proceedings.

Order of FALCONBRIDGE, C.J., reversed.

*E. D. Armour*, K.C., for the appellants.

*J. J. Foy*, K.C., for the respondents.

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FERGUSON, J.]

[14TH SEPTEMBER, 1908.]

LAISHLEY v. GOOLD BICYCLE CO.

*Master and servant—Dismissal of servant—Damages—Future commissions.*

The plaintiff was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause, sales to a large amount having up to that time been effected by him.

*Held*, that, in estimating the damages to which he was entitled, the commission on sales which there was reasonable ground to think might have been effected during the unexpired portion of the term should be taken into consideration.

Judgment of FERGUSON, J., 4 O. L. R. 350, 22 Occ. N. 372, reversed.

*G. H. Watson*, K.C., and *R. D. Moorhead*, for the appellant.

*Wallace Nesbitt*, K.C., and *H. S. Osler*, K.C., for the respondents.



## MAJOR v. MCGREGOR.

*Libel—Words of abuse—Natural signification—Innuendo—Necessity for shewing sense in which words understood.*

Decision of BRITTON, J., 5 O. L. R. 81, *ante* 47, affirmed.

G. F. Shepley, K.C., for the appellant.

D. B. MacLennan, K.C., for the respondent.

## HIGH COURT OF JUSTICE.

[STREET, J., 8TH OCTOBER, 1903.]

*In re* SYDENHAM SCHOOL SECTIONS.

*Public schools—Alteration of school sections—Appeal from township council—Powers of arbitrators—By-law altering school sections—Description of lots.*

The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of ratepayers, have power only to grant or refuse what is asked for in the petition, and have no power to direct the formation of a section differing from that asked for in the petition.

*Re Southwold School Sections*, 3 O. L. R. 81, applied.

In by-laws altering existing school sections or adding territory to them, the lots and parts of lots dealt with must be accurately and exactly described.

N. W. Rowell, K.C., for the applicants.

H. G. Tucker, for the respondents.

## IN CHAMBERS.

[FERGUSON, J., 24TH SEPTEMBER, 1903.]

## ROBERT v. CAUGHELL.

*Practice—Report on sale—No sale for want of bidders—Confirmation.*

A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from, and requires confirmation.

And an order made by a local Judge (without consent) confirming such a report four days after it was made, and

granting foreclosure in default of payment, was held to be bad.

*Edward Meek*, for the defendant.

*F. E. Hodgins*, K.C., for the plaintiff.

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[THE MASTER IN CHAMBERS, 28TH AUGUST, 1908.]

STATE SAVINGS BANK v. COLUMBUS IRON WORKS.

*Writ of summons—Address of defendant—Foreign defendant.*

The address of the defendant is a necessary part of the writ of summons, and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was, on his application, set aside with costs.

*C. A. Moss*, for the foreign defendant.

*W. B. Raymond*, for the plaintiffs.

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[THE MASTER IN CHAMBERS, 25TH SEPTEMBER, 1908.]

MOFFATT v. LEONARD.

*Security for costs—Residence of plaintiff—Family in Ontario—Business out of Ontario.*

The plaintiff was manager of a joint stock company, carrying on business in Ontario, with its head office at Woodstock. His wife and family resided at Woodstock. He was agent of the company at Detroit, but visited his family once a fortnight, and sometimes once a month, but not as a rule for longer than a day and a half at a time.

*Held*, on motion for security for costs under Rule 1198 (a), that the plaintiff under the above circumstances must be held to reside in Ontario.

*C. A. Moss*, for the defendant.

*A. W. Ballantyne*, for the plaintiff.

[THE MASTER IN CHAMBERS, 10TH OCTOBER, 1908.

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CONNER v. DEMPSTER.

*Venue—Cause of action—Con. Rule 529 (b)—Declaratory action.*

“Cause of action” in Con. Rule 529 (b) means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part, or the whole, in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience.

Quære, whether an action for a declaration of right falls within the Rule?

*H. W. Mickle*, for the defendant.

*A. H. F. Lefroy*, for the plaintiff.

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## NOVA SCOTIA.

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### In the Supreme Court.

[McDONALD, C.J., 14TH OCTOBER, 1908.]

REX v. BECKWITH.

*Criminal law—Indictment—Particularity—Statement of offence—Sending before Grand Jury.*

The Judge presiding at a sittings of the Court at Halifax for the trial of criminal causes, caused an indictment to be found against the defendant, a stock broker. The offence charged was a violation of s. 201 of the Criminal Code, the offence being stated in the indictment in the language of the section, without setting out the particular facts constituting the offence.

*W. B. A. Ritchie*, for the accused, moved to quash the indictment before McDONALD, C.J., presiding at the October term of the criminal sittings.

*Longley, A.-G.*, for the Crown.

McDONALD, C.J.—The Crown officer might as well have sent the accused a copy of the Code and marked the section as to have put in his hands this indictment. There is no more particularity in the indictment than there is in the Code. When a man is charged with an offence the indictment should

describe the offence charged with such particularity as would enable the accused to know exactly what he has to meet. In the next place the indictments had clearly not been preferred in accordance with s. 641 of the Code. The Attorney-General did not in person or even by his authority prefer the indictment, and the direction of Mr. Justice Weatherbe, last March, given to the foreman of the Grand Jury in the robing room, was not an order of the Court under the Criminal Code, and it was not in writing. Furthermore, the order made by that Judge some days after the indictment was actually found, authorizing the preferring of the indictment, and bearing a false date, should not be considered a compliance with the statute, which requires the order to be made before the indictment is preferred. The order relied on was not put in writing until after the indictment was found. The policy of the statute is quite plain—to prevent the obvious abuses to which the processes of the Courts would be subverted if any irresponsible person could prefer an indictment against any person no matter how innocent. The indictment must be quashed.

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## MANITOBA.

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### In the King's Bench.

[KILLAM, C.J., 29TH JULY, 1908.]

### GIBBINS v. METCALFE.

*Conspiracy—Combination—Injury to business—Restraint of trade—Rights of individuals—Criminal Code, s. 520.*

This action was brought against a number of individual persons, partnership firms, and corporations, to recover damages for an alleged conspiracy against the plaintiff, and for an injunction restraining "the defendants and each of them from continuing to boycott the plaintiff and from continuing to conspire to injure his business, trade, and credit."

The plaintiff carried on business in Winnipeg as a dealer in grain on his own account and for others upon commission. The statement of claim alleged that, on or about the 23rd October, 1902, the defendants, intending to injure the business and credit of the plaintiff, unlawfully and maliciously conspired, combined, and agreed with one another and with others to boycott the plaintiff, and not to sell to or buy from him any grain, and also, with the intention of inducing other

persons to refuse to buy from or sell to the plaintiff, to boycott and not to buy from or sell to any persons who should have any business dealings with the plaintiff or who should buy from or sell to him, and also not to buy or sell any grain whatever which had in any way passed through the hands of the plaintiff, or which was to be sold to him or through him to any person, and in pursuance of their unlawful and malicious design defendants had refused to buy from or sell to plaintiff any grain which he should handle or deal with, and also prevented other persons from buying from or selling to plaintiff, or from buying or selling any grain with which plaintiff had been connected in any way, and had carried out their design of boycotting the plaintiff, whereby he had suffered great loss and damage.

The plaintiff and most of the defendants were, during the time preceding the action, members of the Winnipeg Grain and Produce Exchange, which was incorporated to promote the establishment and maintenance of uniformity in the produce and provision trades and provide a suitable building for a grain and produce exchange, with power to pass by-laws, to censure, suspend, or expel members, for conduct contrary to the by-laws.

In the autumn of 1902 a corporation known as the "Independent Grain Co." was engaged in the business of buying grain in Manitoba and exporting it. It was not represented or registered in the exchange. It was recognized as a prominent business competitor with members of the exchange. It had offices in the McIntyre block, and its members were known as the "McIntyre block people."

In the early part of October, 1902, there were rumours among the members having offices in the grain exchange building that the "McIntyre block people" were trading with members in the exchange building without conforming to the commission rules, and on the 9th October an informal gathering of members in the building decided not to deal with the "McIntyre block people." Subsequently some members were led to believe that the dealings of the "McIntyre block people" with members in the building were being continued secretly through somebody, and suspicion pointed to the plaintiff as the medium.

On the 23rd October there was another informal gathering of members at which the question of such dealings and the plaintiff's supposed part in them was discussed, when some of the persons present expressed their intention not to deal with him. Some of the defendants were present and so expressed themselves.

The main contention on the part of the plaintiff was that what occurred at that meeting amounted to a conspiracy not to deal with him, that others, also defendants, who were not then present, acceded to the alleged agreement, and joined in the conspiracy, and that in consequence his business fell away and became unprofitable.

The trial Judge found upon the facts as follows:—Certain of the defendants, some acting for themselves and some for firms, or companies represented by them, did agree and combine together not to deal with the plaintiff. They carried out and adhered to their purpose and agreement not to deal with the plaintiff. The effect of the combination was to reduce the plaintiff's business, to his material damage. It was not proved that these defendants attempted to induce other persons, firms, or corporations, other than themselves and those they represented, to refrain from such dealing. There was no evidence that the defendants combined or attempted to influence transportation companies to refuse facilities to the plaintiff or hamper him in any way in the transportation of his commodities. The main objects of the defendants in so combining were to prevent the "McIntyre block people" from selling grain to or buying it from them or other members of the exchange, unless and until those dealers would agree to be bound by the rules of the exchange. This combination and action were not intended to be continued in case the plaintiff would agree not to deal with the "McIntyre block people." The defendants so combining were not actuated by any malicious feeling towards the plaintiff or the "McIntyre block people," or by any wish to injure him or them or other improper motive; but solely by the desire to serve the business interests of themselves and those for whom they were acting and of the members of the exchange generally and in protection of the market created under the rules of the exchange. Except in so far as it might be inferred from the admissions of one witness, there was no positive evidence that any of the "McIntyre block people" were dealing in breach of the rules of the exchange. The combining defendants *bona fide* believed that the dealers known as the "McIntyre block people" had been dealing with members of the exchange in violation of the rules relating to commissions, and they also believed that the plaintiff was a medium through whom the "McIntyre block people" were dealing with members of the exchange, either as their agent or by purchase and re-sale.

*Held*, that the action must be dismissed with costs.

It is established that a malicious conspiracy to injure a trader by inducing present or prospective customers not to

deal with him, gives such trader a right of action against the conspirators for damages resulting from the carrying out of the conspiracy.

It does not, however, appear to be as clearly established that a similar conspiracy to refrain from dealing with a trader for the purpose of injuring him or of inducing him not to trade with certain others gives such a trader a right of action. The mere fact of one person refraining from dealing with another cannot of itself constitute a legal injury. A combination of several to so refrain is, then, not a conspiracy. A number of traders desiring to do business upon certain methods, not illegal, cannot be said to have conspired to do an illegal act or to inflict legal injury when they combine to refrain from dealing with those who refuse to adopt those methods, or who deal with others who refuse to do so, even if a subordinate object is to render the business of any such unprofitable for the ultimate purpose of bringing them to adopt the business methods of the combine, or even of driving them entirely out of business in competition with it.

There was no evidence that the combining defendants sought to compel or induce either the plaintiff or any of the "McIntyre block people" to break any contract by which any of them were bound. There did not seem to have been any design on the part of the defendants to obtain for themselves a monopoly of the grain trade or of any branch of it, or to drive out of business either the plaintiff or the "McIntyre block people." The combining defendants had become bound by certain business rules which placed them at a disadvantage if those not bound by them could resort to the market which the defendants and other members of the exchange doing a similar business had among themselves. They conceived it to be for their interests to keep the "McIntyre block people" out of that market, and for that purpose to avoid dealing with the plaintiff, who could sell to them the grain of the "McIntyre block people," or buy from them for those people without this being apparent. That was but a lawful exercise of their own rights, of the reasonableness or propriety of which this Court was not to judge.

The argument that such a combination was illegal at common law because in restraint of trade was met by the judgment in the *Mogul Case*.

The Chief Justice referred to s. 520 of the Code, as amended by 63 & 64 V. c. 46, and stated that he did not consider that the rules of the exchange could be properly taken as intended or as likely to enhance the price of grain or to prevent or lessen competition in the purchase, barter, sale, or

supply of grain, and still less could they be intended or likely to do so "unreasonably" or "unduly."

So far as the plaintiff and the "McIntyre block people" were concerned, other avenues of trade were open to them, and while their dealings might be lessened through the combination of the defendants, that might not have operated to the restraint or injury of trade or commerce in grain in a general sense.

The conclusions reached were these:—

There was no conspiracy to do any act, or for any object, or to use any means, illegal if done or pursued or used by an individual. The combination was not unlawful by reason of its being a combination of several, because it was in the exercise of defendants' own rights of trading in competition with the plaintiff and the "McIntyre block people" and for the protection of those rights. The plaintiff had no absolute right to trade free from competition or free from the right of the defendants to combine to compete effectively with him or the "McIntyre block people" by the use of means not unlawful in themselves. The combination and the pursuit of its objects, therefore, did not affect any legal right of the plaintiff or operate to do him a legal injury.

*A. J. Andrews and T. R. Ferguson*, for the plaintiff.

*H. M. Howell, K.C., W. E. Perdue, C. P. Wilson, F. H. Phippen, A. Dawson, T. L. Metcalfe, J. F. Fisher, and H. Phillipp*, for the defendants.

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## NORTH-WEST TERRITORIES

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### In the Supreme Court.

[FULL COURT, 16TH OCTOBER, 1908.]

FLEMING v. H. W. McNEIL CO., LIMITED.

*Damages—Trespass—"Wilful" acts—Construction of judgment—Measure of damages—Special damage—Pleading—Evidence—Appeal.*

Appeal by the plaintiffs from the judgment of SIFTON, C.J., awarding the plaintiffs \$1,680.20 damages for trespass, upon the ground that the damages awarded were inadequate.

*N. D. Beck, K.C., and Muir, K.C.*, for the plaintiffs.

*Lougheed, K.C.*, for the defendants.

The judgment of the Court was delivered by

WETMORE, J.—The defendants (the respondents) attempted to set up at the argument of this appeal that the



learned trial Judge erred in holding that there was no evidence to go to the jury of part performance on the part of the defendants to support their right to the coal taken, and that there was therefore a mistrial. We held that this point was not, under the circumstances of the case, open to the defendants.

The first question, then, that this Court has to consider is, what rule should be applied in assessing the damages? I have come to the conclusion that the language of paragraph 1 of the formal order of the Court of the 1st August, 1902, does not preclude the defendants from setting up that the milder rule for assessing damages in cases of this nature should be applied. The language of that paragraph is as follows: "This Court doth declare, order, and adjudge that the plaintiffs are entitled to recover damages from the defendants for and in respect of the wrongful and *wilful* trespass and conversion complained of in the plaintiffs' statement of claim."

It was urged on behalf of the plaintiffs (the appellants) that the use of the word "*wilful*" was an adjudication that the trespass complained of was *wilful*, and therefore that the stronger rule for assessing damages should be applied. This action, in its essential features, is an action of trespass, and having been tried with a jury, I must say that I am inclined to the opinion that the question of the character of the trespasses, that is, whether they were of such a character that the sterner rule for assessing damages should be applied or otherwise, should at least have, under the evidence, been left to the jury. The learned trial Judge, however, did not take that course; he withdrew the whole case from the jury, and referred the question of damages to the clerk of the Court. No objection was taken to this course; the order of the Court was duly settled and taken out, and the respective parties appeared before the clerk and produced what evidence they had to submit, and then, instead of the clerk preparing and filing a report, the whole evidence and question as to the amount of damages was by consent referred to Mr. Chief Justice Sifton, who gave judgment awarding the amount of damages. It is from this judgment that the plaintiffs appeal. It is too late, under these circumstances, for the defendants to successfully contend that the case should be referred back to a jury. We must deal with the case on the material before us as we best can.

As before stated in effect, I have come to the conclusion that the word "*wilful*" in paragraph 1 of the order of the 1st August was not intended as an adjudication that the trespasses were *wilful* in the sense that would render the de-

fendants liable to have the damages assessed against them upon the sterner rule.

In the first place, there is nothing in the judgment of the trial Judge which pronounces on the character of the trespasses in any way. As a matter of fact, that question does not appear to have been argued before him or brought under his notice at all. Apparently that stage of the case had never been reached in so far as he was concerned. At the close of the testimony, and before counsel commenced to close to the jury, objection was raised that the defendants had made out no matter of defence to be submitted to the jury, and that only was argued before the Judge, and he ruled that no defence had been made out and withdrew the case from the jury. The evidence before the trial Judge presented, to say the least, ample scope for discussion as to whether or not the trespasses were of such a character that the sterner rule for measuring damages should be applied. Knowing the care which the trial Judge always brought to bear upon any matter that came under his consideration, I cannot bring my mind to believe that he would come to a conclusion as to the character of the trespasses without giving an opportunity to have the question thoroughly discussed. It does not seem to me altogether clear that the word "wilful" in the order does, under these circumstances, necessarily imply that the trespasses were of such a character that the sterner rule for measuring damages *must* be applied. The defendants deliberately entered the plaintiffs' lands and dug and took away the coal. They did this fully intending to do it. There was no mistake on their part as to this. Therefore, this act may in that sense be said to be wilful.

In *In re Young and Harston's Contract*, 31 Ch. D. at p. 175. Bowen, L.J., defines the word "wilful" as generally used in Courts of law as follows:—"It implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing and is a free agent." But a person may "wilfully" do the act in question in that sense but may at the time do it in the *bona fide* belief that he has the right to do it, and, if he has such *bona fide* belief, it may happen that the case would be one in which the sterner rule would not be applied.

*Martin v. Porter*, 5 M. & W. 351. seems to be the principal case relied on for applying the sterner rule where the trespass is wilful. I think the tendency of later decisions is to interpret that wilfulness to mean a deliberate trespass

by a person who commits it intentionally with a knowledge that he has no right whatever to do the act. For instance, in *Job v. Potter*, L. R. 20 Eq., we find Bacon, V.-C., laying down the following at p. 97: "If a wrongdoer does an act which, if it were the case of a chattel, and capable of sustaining an indictment, would amount to larceny, then the most rigorous mode of taking the accounts is that which is adopted against him."

In *Union Bank of Canada v. Rideau Lumber Co.*, 4 O. L. R. 721, the allegation in the statement of claim was that the trespasses were "wrongfully and wilfully" committed. The formal judgment drawn up and settled stated that "this Court doth declare and adjudge that the plaintiffs have the right to recover damages from the defendants in respect of the matters complained of in the plaintiff's statement of claim," and it was referred to the Master to ascertain the value of the timber, and the Master treated the matter as open and reached the conclusion that the trespasses were not wilful, but rather innocent or inadvertent, and applied the milder rule of assessment. The report was appealed from, and Lount, J., held that the damages should be assessed on the footing that the trespasses were "wrongful and wilful." His decision was appealed to the Court of Appeal, and the judgment of that Court was given by Garrow, J.A., who is reported as follows at p. 725: "In the reasons for his judgment the learned Judge (Lount, J.) apparently held that the nature and quality of the trespasses in question were *res judicata* by the judgment pronounced at the trial, a conclusion which, with deference, I am inclined to doubt." In this case the Court of Appeal held that the sterner rule should be applied, because the evidence disclosed that the trespasses were "wrongful and wilful." but, as it appears from the quotation I have made, if the contrary had appeared by the evidence, it was, to say the least, doubtful whether they would not have upheld the Master's report, notwithstanding the form of the order.

In view of all the circumstances of this case, and a consideration of the authorities I have referred to, I have come to the conclusion that in settling the order in question the words "wrongful and wilful trespass and conversion" therein were used merely as words of description, echoing the language of the statement of claim, and without the intention of so describing the character of the trespass that the sterner rule for measuring damages must necessarily be applied. It was, therefore, open to the present Chief Justice to consider whether the milder rule for assessing damages should be applied, and, if the evidence warranted it, to apply it. The

learned Chief Justice has found that the milder rule should be applied because the defendants worked under a mistaken idea "that they were entitled to enter upon the said land." In order to come to that conclusion he must have found that the evidence of William Francis Little given at the trial was correct, namely, that the defendant Sanford Hall Fleming, after reading what appeared to be a telegram, told him that Merritt (the husband of the plaintiff Maggie Merritt) consented to the offer of 20 cents royalty, and, after calling at his father's residence and telephoning, told him that his father (Sir Sanford Fleming) also consented, and then told him, in answer to his inquiry, in effect, that it "would be all right to telegraph to the boys to go ahead with the work." That Little did in consequence, send a telegram and that work was then commenced with a view of entering the plaintiffs' mine. He must also have found that Little and the defendants *bona fide* believed that what Sanford Hall Fleming so said was true, and that he had authority to say what he did so say, and to give the permission to go on with the work. He must also have found that the defendants *bona fide* believed that what they did prior to the 16th January, when the telegram was received from S. H. Fleming of that date, was such a part performance as to justify them in believing that they could insist upon specific performance of the contract, and warranted their entering the plaintiffs' mine after that date, as they did. In fact, all the trespasses were committed after that date.

I think the evidence warranted the Chief Justice in accepting William Francis Little's testimony as to what took place between him and Sanford Hall Fleming, and I am inclined to think that I would have reached the same conclusion myself had I been in his place.

I am also (but I admit with some hesitation) inclined to the opinion that he was warranted in finding the *bona fides* of the defendants, that is, that they entered the mine under a mistaken idea as to their rights. I am not prepared to dissent from his conclusion. And at any rate I think that the question is pretty close to the border line. I am very much impressed with the remarks of Fry, J., in *Trotter v. Maclean*, 13 Ch. D. at p. 587, where, after quoting with apparent approval the observations of Lord Hatherley in *Jegon v. Vivian*, he remarks as follows:—"Those observations are very material in two ways. In the first place they express the view of the Lord Chancellor that the milder rule is to be assumed when the propriety of applying the contrary rule is not shewn, and they throw the burden on him who asserts that the severer rule ought to be applied." I am prepared

to follow what is there suggested, and the evidence does not satisfy me that this is a case to which the severer rule should be applied to all the trespasses complained of. I am of opinion, to use the language of Lord Hatherley in *Jegon v. Vivian*, 40 L. J. Ch. at p. 397, that the defendants had "a reasonable colour of title on which (they) might proceed," and so were not wilful wrongdoers in the sense that they were aware that they had no right to do what they did do. This is true down to the 1st August.

I am of opinion, however, that fixing the damages on a basis of 20 cents on the ton royalty cannot be supported.

Under the circumstances of this case and under the authorities, the measure of damages should be the value of the coal at the mouth of the mine, less the cost of digging it and transporting it there as a merchantable article, and by digging it I mean hewing it, as it is expressed in some of the cases. In getting at this cost of digging and transporting, it is not correct to charge the expense of maintaining and managing the defendant company and the payment of its officers. The company and its machinery for its government and management were created with a view of carrying on its legitimate work, not for the purpose of committing acts of trespass, no matter how innocently done, and the cost of such government and management must be charged against its legitimate work. In so far as the trespass is concerned, the defendants stand as an individual, and have a right to deduct from the value at the mouth of the mine what they actually disbursed and paid out to the man who went in and actually did the work and committed the trespass, and what was disbursed as incidental to such work. For the purpose of arriving at that, I accept the figures of Mr. Frank Brown Smith in so far as they coincide with my views, and they are as follows:

For digging .....	\$1 41	per ton.
For yardage .....	50	"
For supplies .....	50	"
For hauling .....	15	"
	<hr/>	
	2 56	"
Add to this wages for transportation .....	53	"
	<hr/>	
In all .....	\$3 09	

I do not allow anything for salaries of president, manager, secretary, and officers of the company. The value of the coal at the mine's mouth was \$3.83 per ton; deducting from this \$3.09, leaves a balance of 74 cents, and the plaintiff is en-

titled to recover as damages for the coal taken, down to the 1st August, the amount of the coal so taken at 74 cents per ton. The coal taken down to the 1st August was 6,108 tons, which at 74 cents a ton amounts to \$4,519.92.

The trespasses after the 1st August were deliberately and knowingly wilful on the part of the defendants. The judgment of McGuire, C.J., was delivered on that date, and it is impossible to hold that after that date they could have *bona fide* imagined that they had any rights as to the coal taken after that date. They are liable for the value of the coal at the mouth of the mine, less the cost of transportation only, which I fix at 78 cents a ton, and which deducted from \$3.83 leaves \$3.05. The defendants after the 1st August took out 2,293 tons, which, at \$3.05 a ton, amounts to \$6,993.65. This makes the total damage which the plaintiffs are entitled to recover in respect of the trespasses in taking the coal, \$11,513.57. The plaintiffs also claim further damages in this way. They assert that the only way by which the coal still left in their mine within the area where the defendants have carried on their operations can be taken out is by working in the adjoining properties, of which the defendants are only the lessees, and that, as soon as the defendants cease to operate their mine on that property, the whole mine, including that in the plaintiffs' land, will be flooded, and the coal in the pillars in the plaintiffs' land will become a total loss. I am of opinion that the evidence is not of a character to warrant us in allowing any damages in respect of that claim. The evidence does not establish satisfactorily to me that the coal in these pillars will be lost. I can conceive that circumstances may arise under which it would not be lost. Moreover, I am very doubtful if the damages so claimed are not what are called special damages, and whether the claim in respect of them is sufficiently set out in the statement of claim.

It may be as well to state that the defendants' counsel applied at the hearing of this appeal to amend the order of the 1st August by striking out the word "wilful," and the Court refused the application.

Counsel for the defendants also took the preliminary objection at the hearing that the appeal did not lie because leave to appeal had not been granted, and the objection was overruled.

The order appealed from will be varied by changing the figures \$1,680.20, wherever they occur therein, to \$11,513.57, and the defendants will pay to plaintiffs their costs of this appeal.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

MACMAHON, J.]

[14TH SEPTEMBER, 1908.]

MIDLAND NAVIGATION CO. v. DOMINION  
ELEVATOR CO.

*Ship—Charterparty—Breach—Failure to deliver cargo—Duty of charterers  
—Time—Insurance—Failure to carry goods—Place of loading—Terms  
of contract—Custom of port—Measure of damages.*

The plaintiffs, being the owners of a vessel called the *Midland Queen*, agreed by telegram with the defendants to carry a cargo of wheat from F. W. to G. at four and a half cents a bushel, confirming it as follows: "We confirm Midland Queen four and half G. load F. W. on or before noon fifth December."

The wheat was in the elevators at F. W., and the *Midland Queen* arrived in that harbour on the 3rd December, but, as several vessels had arrived before her, and she had to take her turn to get to the elevators according to the regulations of the owners of the elevators there, of which all parties were aware, she was not loaded by the time fixed, and had to leave for home without a cargo in order to save her insurance.

In an action for the freight:—

*Held*, that the defendants' duty was to furnish a cargo at the elevators, the only place of loading at F. W., and the contract should be read as if the words "at the usual place" were inserted; and that the plaintiffs' contract was to proceed to the usual place of loading, receive the cargo, and carry it to the point of destination; that the loading was to be done by noon of the 5th; that the defendants not having done anything to obstruct the vessel in getting to the elevators,

and the plaintiffs having failed to shew that the defendants were in default, their action should be dismissed; and that the vessel not having arrived sufficiently in advance to secure her turn in time, the defendants were entitled to such damages as fairly resulted from the breach of contract and were in contemplation of the parties; and these damages were to be measured by the injury suffered by the cargo being left on the defendants' hands.

Judgment of **MACMAHON, J.**, at the trial, reversed; **MACLENNAN, J. A.**, dissenting.

*Per MACLENNAN, J. A.*—When the contract contains an unqualified time limit for loading on the part of the charterer, and the ship has arrived at the designated port in sufficient time, the charterer is answerable for not loading within the time, whatever be the nature of the impediment which prevents him from performing it.

*A. B. Aylesworth, K.C., and C. A. Moss, for the defendants, the appellants.*

*C. Robinson, K.C., and F. E. Hodgins, K.C., for the plaintiffs.*

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**MACMAHON, J.]**

[16TH NOVEMBER, 1903.

**STEWART v. WALKER.**

*Will—Probate—Lost will—Evidence—Solicitor—Privilege—Declarations*

The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator, who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence.

Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn, and was claiming large benefits under, the will in question, which, it was alleged, had been lost or stolen.

The facts that the testator was aware that unless he made a will his property would go to the Crown; that he was an



experienced man of business possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days' duration, he had expressed no wish to make a will: were held sufficient to rebut the presumption of destruction of the will by the testator.

Judgment of MACMAHON, J., affirmed.

*G. F. Shepley*, K.C., and *A. B. Aylesworth*, K.C., for the Attorney-General for Ontario.

*G. H. Watson*, K.C., and *Grayson Smith*, for the plaintiff.

*S. H. Blake*, K.C., *W. R. Riddell*, K.C., and *J. Lorn McDougall*, for the other respondents.

BRITTON, J.]

[26TH OCTOBER, 1908.]

### REX v. CARLISLE.

*Constitutional law—Ontario Liquor Act, 1902—Intra vires—Voting on by electors—Delegation of legislative power—Corrupt practices—Appointment of Judge to conduct trial—Jurisdiction—Place of trial—Jury—Conviction—Sentence—Imprisonment—Penalty—Costs—Form of conviction—Habeas corpus—Warrant of commitment.*

The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws.

*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. C. 348, and *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A. C. 73, followed.

The Legislature, in enacting the Liquor Act, did not exceed, or fail to properly exercise, its powers.

Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them.

*Russell v. The Queen*, 7 App. Cas. 829, *The Queen v. Burah*, 3 App. Cas. 889, and *City of Fredericton v. The Queen*, 3 S. C. R. 505, followed.

By s. 91 (4), providing that the President of the High Court shall designate a County or District Judge to conduct the trial of persons accused of corrupt practices at the taking

of the vote under part I., the Legislature did not assume the power of appointing Judges, and did not exceed its powers in providing that a County or District Judge designated should exercise jurisdiction outside of his own county or district; and a Judge so designated may try the accused without a jury.

The provisions of s.-ss. (2) and (3) of s. 91 are amplifications of the provisions of the Ontario Election Act which are incorporated in the Liquor Act; and the Judge in this case did not exceed his powers in sentencing the accused, whom he found guilty of personation, to one year's imprisonment in addition to the payment of a penalty of \$400 and costs.

The jurisdiction is to try at any place in Ontario, and, it appearing in the order of conviction that the trial was held under the Act, and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York, at the city of Toronto, the order shewed jurisdiction, although it did not specify the place of trial.

It was immaterial that the order of conviction was intitled in the High Court of Justice, and that it did not shew the informer's name, the County Crown Attorney of the County of York being shewn to be the prosecutor. Nor was it material that the date of the offence was not shewn, the time for conviction not being limited by statute.

The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of \$400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid.

*Held*, that upon *habeas corpus* proceedings within the year, the objections that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered; but the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year.

The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a taxing officer.

Order of BRITTON, J., affirmed; OSLER, J. A., dissenting.

W. J. Tremear, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACLAREN, J.A., 14TH SEPTEMBER, 1908.]

## STRUTHERS v. CANADIAN COPPER CO.

*Master and servant—Medical attendance on servant—Liability of master—  
Privity—Implied authority—"Hospital fund."*

A fund called "the hospital fund" was held by a mining company for the purpose of providing medicine and medical attendance for those of the men who required it, medical men being attached to the works, whose duty it was to attend the men and provide the necessary medicines.

*Held*, that no obligation was imposed on the company to pay out of this fund for the services of any physician whom the men might choose to employ.

Judgment of MEREDITH, J., affirmed.

*Wallace Nesbitt*, K.C., for the appellants, defendants.

*A. B. Aylesworth*, K.C., for the plaintiffs.

[BOYD, C., FERGUSON, J., 22ND SEPTEMBER, 1908.]

## TODD v. TOWN OF MEAFORD.

*Railway—Municipal corporation—Expropriation of land—Agreement with owner—Possession—Compensation—Damages—Arbitration—Action.*

In carrying out the agreement provided for in 63 V. c. 77 (O.) the purchasing agents of a town corporation agreed with the plaintiff for the purchase of and possession by a railway company of the portion of the plaintiff's land required by the company, but without fixing the price.

The company, having, pursuant to s. 131 of the Railway Act, 51 V. c. 29 (D.), deposited a plan, profile, and book of reference of the land in the county registry office, which were approved by the Railway Committee of the Privy Council, entered and completed the work.

The purchase money not having been agreed upon or paid, the plaintiff brought an action against the town corporation and railway company for damages to the land and for interference with his business.

*Held*, that the defendants the town corporation were not liable, and that the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action.

*Per* FALCONBRIDGE, C. J., at the trial:—Expected increased profits from enlargement of plaintiff's buildings and plant are too speculative and uncertain to form a true measure of damage.

Judgment of FALCONBRIDGE, C. J., varied.

*G. H. Watson*, K.C., and *Grayson Smith*, for the plaintiff.

*R. C. Clute*, K.C., for the defendant town corporation.

*G. F. Shepley*, K.C., for the defendant railway company.

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[BOYD, C., MACMAHON, J., TEETZEL J., 31st OCTOBER, 1903.]

✓ STANDARD LIFE ASSURANCE CO. v. VILLAGE OF  
TWEED.

*Municipal corporation—Debentures—Defective by-law—Remedial statutes.*

A municipal by-law was passed in 1892, on which debentures were issued, which provided for payment of the interest, but failed to provide for payment of the principal. The statute 3 Edw. VII. c. 18, s. 93 (O.), enacts that "where in the case of any by-law heretofore or hereafter passed, the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding."

*Held*, that the effect of this is to make one payment of interest validate the debenture in respect of which it is paid, and one payment of principal validate the debenture in respect to which it is paid; and that accordingly the debentures here in question fell within the scope of this remedial enactment.

*A. Bruce*, K.C., and *D. L. McCarthy*, for the plaintiffs.

*J. A. Mills* and *C. W. Craig*, for the defendants.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 2ND NOVEMBER, 1903.

COOK v. DODDS.

*Promissory note—Statute of Limitations—Acknowledgment—Executor de son tort—Payments by—Bills of Exchange Act—Dominion and Provincial legislation—Joint contract.*

A payment or acknowledgment by an executor *de son tort* cannot be relied on to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased. But where the executor *de son tort* has made payments of interest in respect to a promissory note, within six months before action commenced, and the holder of the note brings action against her to make her answerable to the extent of the goods of the deceased come to her hands, it is not open to the defendant, for the purpose of preventing a payment giving a new start to the Statute of Limitations (which effect it would have if made by the lawful personal representative), to rely on his having been a wrongdoer and not the true representative. As between himself and the plaintiff, as respects payments made by the executor *de son tort* and their effect, the latter is to be treated as the true representative of the deceased.

The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or note contains, and therefore these consequences fall to be determined according to the law of the Province in which the liability is sought to be enforced.

Judgment of Second Division Court in the county of Huron varied.

W. Proudfoot, K.C., for the plaintiff.

W. E. Middleton, for the defendants.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 4TH NOVEMBER, 1903.

*In re* CONFEDERATION LIFE ASSOCIATION AND CLARKSON.

*Will—Executors—Power to sell lands—Power to exchange—Vendor and purchaser.*

A testator devised her real estate to be equally divided between her children when the youngest of them attained

twenty-one, with a power to the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales."

*Held*, that the executor had no authority to exchange the lands of the testatrix for other lands.

*C. P. Smith*, for the vendors.

*M. H. Ludwig*, for the purchaser.

[STREET, J., BRITTON, J., 9TH NOVEMBER, 1903.]

*In re* WARBRICK AND RUTHERFORD.

*Landlord and tenant—Overholding tenant—Writ of possession—Prohibition to County Judge and sheriff—Certiorari—R.S.O. 1897 c. 171, s. 6.*

After an order had been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ had been issued, the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff.

*Held, per* STREET, J., that proceedings under the Overholding Tenants Act can be removed into the High Court only when s. 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief.

*Per* BRITTON, J., that whether s. 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court.

Judgment of MACMAHON, J., affirmed.

*Robert McKay*, for the tenant.

*W. T. J. Lee*, for the landlord.

[STREET, J., BRITTON, J., 12TH NOVEMBER, 1903.]

*In re* McDONALD.

*Will—Construction—"Dying without heirs"—Estate.*

A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain

legacies and charges, and "in the event of her dying without heirs" then to the testator's brothers and sisters.

*Held*, that the ulterior devisees being related to the first devisee, the "heirs" of the first devisee must be construed to be "heirs of the body," and therefore that as to the realty the daughter took an estate tail, and as to the personalty an absolute estate.

Judgment of FALCONBRIDGE, C.J., varied.

*H. J. Wright*, for the executors.

*J. H. Moss*, for the daughter.

*F. W. Harcourt*, *J. H. Spence*, and *A. W. Holmested*, for the brothers and sisters and their children.

[STREET, J., BRITTON, J., 12TH NOVEMBER, 1903.]

*In re* JELLY, UNION TRUST CO. v. GAMON.

*Executors and administrators—Evidence—Corroboration—R. S. O. 1897 c. 73, s. 10.*

Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances.

Judgment of the Master in Ordinary affirmed.

*J. Bicknell*, K.C., for the appellants.

*J. H. Moss*, for the respondent.

[STREET, J., BRITTON, J., 18TH NOVEMBER, 1903.]

MOONEY v. GROUT.

*Contract—Services by near relatives—Implied right to remuneration—Presumption.*

The presumption against an implied right to remuneration for services rendered by near relatives arises only when the persons rendering the services, and those to whom they

are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may in the case of near relatives be negatived on very slight grounds.

The Court held on the facts in this case that the plaintiff, a married woman who left her own home to nurse her sister, was not entitled to remuneration for her services.

Judgment of MEREDITH, C.J., affirmed.

*R. C. Clute*, K.C., and *J. A. McInnes*, for the plaintiff, appellant.

*A. H. Marsh*, K.C., and *F. W. Thistlethwaite*, for the defendants.

[STREET, J., BRITTON, J., 21ST NOVEMBER, 1908.]

✓

DUNN v. MALONE.

*Interest—Contract—Chattel mortgage—Statement of rate—Interest Act, 1897—Statutes—Waiver.*

A chattel mortgage provided for the payment of \$125, the principal money, in consecutive monthly instalments of \$5 each, and for payment of \$5 more with each instalment, for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897.

*Held*, that this being an Act passed on grounds of public policy for the benefit of borrowers, its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate.

Judgment of SNIDER, Co.J., affirmed.

*W. S. McBrayne* and *Martin Malone*, for the appellant, the defendant.

*D'Arcy Martin*, for the plaintiffs.

[BOYD, C., 20TH FEBRUARY, 1908.]

FAWKES v. ATTORNEY-GENERAL FOR ONTARIO.

*Land Titles Act—Claim on assurance fund—Transfer induced by fraud—Subsequent fraudulent transfers—Forgery—Bona fide purchaser for value without notice.*

The plaintiff, being the owner of land registered under the Land Titles Act, R. S. O. 1897 c. 138, was, by the fraud



of two persons, G. and H., induced to transfer her land to one D. Subsequently a transfer to McD., purporting to be signed by D., was registered, but D.'s signature was forged. McD. then transferred to O'M., and O'M. to B., both being parties to the fraud with G. and H. B. transferred to C., an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible, an action was brought for compensation for the loss of the land out of the assurance fund, under ss. 130 and 132 of the Act.

*Held*, that the plaintiff was not "wrongfully deprived" under s. 132, and that she could not recover.

*N. W. Rowell*, K.C., and *Casey Wood*, for the plaintiff.

*R. C. Chute*, K.C., and *McGregor Young*, for the defendant.

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[FALCONBRIDGE, C.J., 7TH OCTOBER, 1903.]

KINGSTON v. SALVATION ARMY.

*Parties—Unincorporated association—Salvation Army—Action for tort.*

The Salvation Army is an unincorporated religious society, and an action cannot be maintained against it for torts committed by its officers.

The judgment in this action on the motion to set aside the writ of summons, reported 5 O. L. R. 585, *ante* 229, considered and not followed.

*D'Arcy Tate*, for the plaintiffs.

*A. Hoskin*, K.C., and *G. Lynch-Staunton*, K.C., for the defendants.

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[BRITTON, J., 19TH OCTOBER, 1903.]

CENTRAL TRUST CO. OF NEW YORK v. ALGOMA  
STEEL CO.

*District Courts—Jurisdiction—Recovery of land—Mortgages—Injunction—  
High Court action—Multiplicity.*

The plaintiffs, being mortgagees of land, issued out of the District Court for the district in which the land was situated a writ of summons indorsed with a claim to "recover possession" of the land, "and for an order that the de-

defendants do forthwith deliver up possession" thereof, describing the land.

*Held*, that the indorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R. S. O. 1897 c. 109, s. 9, s.-s. 2 (d).

*Independent Order of Foresters v. Pegg*, 19 P. R. 80, distinguished.

The fact that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief as in the other action, was not a ground for enjoining the plaintiffs from proceeding in the District Court.

*G. F. Shepley*, K.C., and *W. E. Middleton*, for the defendants.

*C. H. Ritchie*, K.C., and *J. Bicknell*, K.C., for the plaintiffs.

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## IN CHAMBERS.

[OSLER, J.A., 19TH OCTOBER, 1908.]

### STANDARD TRADING CO. v. SEYBOLD.

*Costs—Security for—Increase in amount—Costs thrown away by postponement of trial—Amendment.*

While the practice as to granting additional security for costs has been relaxed in favour of the granting of such security, the plaintiff, however, must not be checked at every stage of the action by security being ordered dollar for dollar for all costs incurred, or which might be incurred, without regard to the conduct of the parties.

On the commencement of an action security to the amount of \$200 was ordered. After the action had proceeded, \$300 further security was ordered; and, on a commission to take evidence being issued, a further sum of \$100. On the action coming on for trial the defendants were granted leave to amend their pleadings, and, on the plaintiffs stating that they were not ready to proceed on the amended record, the trial was postponed, the costs of the day being made costs in the cause to the successful party. The defendants then obtained an order from a local Master directing \$600 further security to be given.

On an appeal to a Judge, the order was set aside.

*Semble*, that the application for additional security should have been made to the Judge at the trial at the time the postponement was asked for.

*J. T. C. Thompson*, for the plaintiffs, appellants.

*C. J. R. Bethune*, for the defendants.

[FALCONBRIDGE, C.J., 23RD SEPTEMBER, 1908.]

*In re* BLACK EAGLE MINING CO. ✓

*Sheriff—Poundage—Money paid before sale—Possession money.*

Where a sheriff made a seizure under writs of *fieri facias* of property of the judgment debtor, and a few hours before the sale the judgment debtor came to the sheriff and paid the full amount of the judgment debt:—

*Held*, that the sheriff was entitled to poundage on the full amount of the judgment debts, and not merely on the value of the property seized.

*Held*, also, that under the circumstances of this case \$2.25 per day was not too much to allow for possession money.

*W. M. Douglas*, K.C., for the sheriff.

*N. W. Rowell*, K.C., for the judgment debtors.

[MACLAREN, J.A., 27TH OCTOBER, 1908.]

ATKINSON v. PLIMPTON.

*Writ of summons—Service out of jurisdiction—Sale of goods—Breach of contract—Place of performance—Property passing—Order for service—Affidavit—Non-disclosure—Discretion as to Forum.*

The defendants lived in England. One of them, being in Ontario, saw the plaintiffs, who lived in Ontario, and it was agreed that the plaintiffs should send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, via Leyland line from Boston, delivered f.o.b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the goods shipped in the same way. Before this order was filled the defendants were sued in England

for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned.

*Held*, that the property in the goods passed to the purchasers on the delivery on board the vessel at Boston, and that an action would thereupon lie in Ontario, which was the place for payment, for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in a case of a sale by sample, *prima facie* the place of delivery is the place for inspection, and there was nothing in the contract to rebut the presumption.

Therefore the action came within Rule 162 (1) (e), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed.

*Held*, also, that it was not necessary for the plaintiffs, in obtaining an *ex parte* order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods, and returned them to the plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained.

*Held*, lastly, that a proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England.

*Lopez v. Chavarri*, [1901] W. N. 115, distinguished.

*J. T. Small*, for the defendants.

*W. E. Middleton*, for the plaintiffs.

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[MACMAHON, J., 22ND OCTOBER, 1908.]

*In re KINNY.*

*Will—Charitable devises and bequests—Designation of beneficiaries—Perpetuities—Mortmain Acts.*

Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Churchtown. . . Ireland. The presiding clergyman, committee, and elders to have full control of all after me. They shall have the power to sell or rent to the best advantage. . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, committee, and

ruling elders, having succeeding authority to remember the poor of the church at Christmas every year, and to cheer the poor and the broken-hearted with the joy of Christ's death and sufferings, together with the presents presented by the minister, committee, and ruling elders at the Christmas time every year." By a codicil he appointed two persons executors and trustees, and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months of the making the will and codicil, leaving both real and personal property.

*Held*, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently well designated, and came within the meaning of s. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. c. 2; and, the gifts being charitable, the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect.

*Held*, also, that the word "assurance" in s.-s. 6 of s. 7 of that Act refers to a deed, not to a will, and therefore leaves s. 4 of R. S. O. 1897 c. 112 untouched, and under that section a devise in favour of a charity is good, though made within six months before the testator's death.

*H. W. Mickle*, for the executors.

*E. D. Armour*, K.C., for the Presbyterian congregation of Churchtown.

*A. W. Holmsted*, for the heirs at law and next of kin of the testator.

[STREET, J., 18TH OCTOBER, 1908.]

✓ POSTLETHWAITE v. McWHINNEY.

*Writ of summons—Service out of jurisdiction—Parties—Injunction—Con. Rule 162.*

An order allowing service of a writ of summons out of the jurisdiction cannot be supported under clause (e) of Con. Rule 162, unless the injunction can properly be asked as against the defendant out of the jurisdiction sought to be served.

In proceeding under clause (g) of Con. Rule 162 the defendant within the jurisdiction should be served with the writ and then an order applied for for leave to serve the defendant resident out of the jurisdiction with a concurrent writ, and failure to proceed in this way is not such an irregularity merely as can be condoned.

*Collins v. North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228, followed.

*Livingstone v. Sibbald*, 15 P. R. 315, *Mackay v. Colonial Investment and Loan Co.*, 4 O. L. R. 571, 22 Occ. N. 389, and *In re Jones v. Bissonnette*, 3 O. L. R. 54, 22 Occ. N. 53, considered.

*S. B. Woods*, for the defendant.

*R. B. Beaumont*, for the plaintiff.

[STREET, J., 30TH OCTOBER, 1903.]

*In re REID.*

*Gift—Donatio mortis causa—Savings bank deposit—Delivery of pass book—Evidence—Corroboration.*

The money at the credit of a savings bank depositor may pass as a *donatio mortis causa* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book.

Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causa*; that is, any evidence which is believed and is corroborated as required by the statute may be acted upon.

*A. Spotton*, for the executors.

*W. H. Blake*, K.C., for the claimant.

[STREET, J., 2ND NOVEMBER, 1903.]

GRAHAM v. BOURQUE.

*Chose in action—Assignment of money payable “in respect of the contract”—Damages for interference with the work—Attachment of debts.*

A contractor for the construction of a drain assigned to a bank as security for advances “all and every sum or sums of money now due or to become due and payable to me by (the employer) in respect of a certain contract existing between myself and the said (employer) for the construction of section three of the drain,” describing it. The cost of doing the work was increased owing to the employer negligently allowing water to flow into the drain, and the contractor obtained a judgment against the employer for damages for the negligence.

*Held*, that the amount payable under this judgment passed to the bank as money payable in respect of the contract, and was not attachable by a judgment creditor of the contractor.

*W. E. Middleton*, for the bank.

*J. H. Moss*, for the judgment creditor.

*W. N. Ferguson*, for the garnishees.

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[THE MASTER IN CHAMBERS, 31ST OCTOBER, 1903.]

TAYLOR v. TAYLOR.

*Writ of summons—Substituted service—Solicitor.*

After instructions to a solicitor to accept service of a writ of summons had been revoked, an order was obtained by the plaintiff for substituted service of the writ upon him.

*Held*, that he had no *locus standi* to move to set aside the order.

An error in the report of *Young v. Dominion Construction Co.*, 19 P. R. 139, pointed out.

*W. J. Elliott*, for the solicitor.

*H. D. Gamble*, for the plaintiff.

(Affirmed on different grounds, by BOYD, C., 9th November, 1903.)

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NOVA SCOTIA.

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In the Supreme Court.

IN CHAMBERS.

[MEAGHER, J., 26TH OCTOBER, 1903.]

HART v. BISSETT.

*Parties—Joinder—Principal and agent—Order 16, Rules 4, 6.*

The plaintiff brought an action against an agent and his undisclosed principal for damages for breach of contract. In the defences a point of law was raised that it was not competent to the plaintiff to join both in the same action, and the point of law was set down for hearing.

*E. P. Allison*, for the plaintiff, contended that both might be joined in the same action under Order 16, Rules 4 and 6, and the plaintiff need not make his election until the trial.

*Russell*, K.C., contra.

MEAGHER, J.—Under the old practice it was competent to the plaintiff to sue the agent in one action and the principal in another, but his remedy was limited to a judgment in one action. Having regard to these principles, Order 16, Rules 4 and 6, are wide enough to admit of the action being brought against both. The claim is not in the alternative. The plaintiff cannot recover against both, and must make his election before judgment. *Honduras R. W. Co. v. Tucker*, L. R. 2 Ex. 305, and the language of Collins, L.J., in *Thompson v. London County Council*, [1899] 1 Q. B. 845, referred to as in point.

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[MEAGHER, J., 11TH NOVEMBER, 1908.]

CORNING v. BENT.

*Will—Construction—Devise—Repugnancy.*

Originating summons for construction of a will.

MEAGHER, J.—The testator, Norman H. Bent, by his will gave his wife an interest for life, or until she should marry, in his dwelling house and lot and the furniture, etc., therein, and after her death or remarriage, whichever first happened, he gave them to his children, living when he made his will or living at his decease, or born after his decease, share and share alike, and their heirs and assigns forever. The gift thus made to his children was the largest the law admits of. By subsequent clauses in his will he endeavoured fruitlessly, as I think, to take away the gift to his children, which he had bestowed by the above clause.

In the view I take of this will, it plainly offends against the principle recognized in *Holmes v. Godson*, 8 DeG. M. & G. 152; *Shaw v. Jones-Ford*, 6 Ch. D. 1; *Bowman v. Oram*, 26 N. S. Repts. 318; and other well known cases.

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[RITCHIE, J., 24TH NOVEMBER, 1908.]

WATSON v. LEUKTEN.

*Bail bond—Discharge—Exoneretur.*

This was an application for an order to deliver up the bond, given on the defendant's arrest, to be cancelled, the action having been dismissed.



RITCHIE, J., held, that the order should be for the entry of an *exoneretur* on the bond, not for the delivery up of the bond, following the old practice (*Allison v. Desbrisay*, *Cochrane* 19), there being no specific Rule in the Nova Scotia Judicature Act, on the subject.

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## MANITOBA.

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### In the King's Bench.

[BAIN, J., 2ND NOVEMBER, 1908.]

*In re* SLATER.

*Infant—Custody of illegitimate child—Rights of mother—Exercise of judicial discretion—Abandonment of child—Agreement—Forswifamiliation.*

Application by the mother for the custody of an illegitimate child, a boy 12 years of age. The mother, who was only 17 when the child was born, was unable to support him, and arranged with one J. Setter to take the child, and he had been with Setter ever since. At the time she gave the child to Setter she executed a document which set forth that she "doth hereby give, grant, release, and abandon unto the said party of the second part forever her said male child and all her right and title as the mother of the said child to the custody, control, and possession of said child from henceforth." Setter on his part agreed that he would maintain, care for, and educate the child. The mother subsequently married and had five children. The boy had been maintained and brought up by Setter and his wife as their own, and the mother had never interfered with their control of the child or shewn any interest in him until a few weeks before the application, when she made a demand on them for his custody; she alleged that he was made to do work which was too hard for one of his years, and that Setter had not carried out his undertaking to have him educated. It did appear the boy had never attended school, but the nearest school was five miles off; he had been taught at home by Mrs. Setter. The Setters were in comfortable circumstances; they had no children of their own; and had brought the boy up with the same care that they would have bestowed on a child of their own.

*Held*, that the application should be refused. The interests of the child would be better served by leaving him with the Setters than by handing him over to his mother. The right of the mother to the custody of the child cannot be regarded as an absolute one, and the Court has full authority to consider the best interests of the child: *Regina v. Nash*, 10 Q. B. D. 454; *Barnardo v. McHugh*, [1891] A. C. 388.

The agreement the mother made with Setter to make over the child to him was not one that could be legally enforced against her, even if she had been of age when she executed it: *Andrews v. Salt*, L. R. 8 Ch. 622.

Setter took the child and had maintained him, relying on her agreement to abandon all claim to him; for eleven years the mother had taken no interest in the child, and had allowed Setter to suppose that she intended to stand by her agreement; under these circumstances the Court would require to be very clearly satisfied that it would be to the advantage and benefit of the child that he should be returned to the mother's custody, before exercising discretion in her favour.

*A. J. Andrews*, for the applicant.

*J. R. Haney*, for Setter.

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[RICHARDS, J., 21st AUGUST, 1908.]

### BANK OF BRITISH NORTH AMERICA v. BOSSUYT.

*Banks and banking—Discount of notes—Excessive rates of interest—Payment by cheques on overdrawn account, afterwards met—Excess not recoverable.*

The plaintiffs, a banking corporation subject to the provisions of the Bank Act, discounted, at their branch at Dawson, notes made by the defendant, one of their customers there, and also allowed him to overdraw his current account. The notes were payable on demand, and purported to bear interest at 20 per cent. per annum. The defendant also agreed to pay interest at that rate on his overdraft: afterwards the rate was reduced to 18 per cent. The defendant from time to time gave the plaintiffs cheques to pay interest accrued; when the cheques were given the accounts they were drawn against had already been overdrawn. But each account was at some date after the giving and charging up of such cheques on it changed into a credit balance in the defendant's favour by deposits or by collections made by the plaintiffs for the defendant's account. Those cheques covered such interest up to the 31st January, 1902.

The plaintiffs credited themselves with interest at 24 and 18 per cent. up to 31st January, 1902, and alleged that it was paid them by the above cheques.

The defendant contended that the giving of the cheques was not payment of the interest, but that they constituted at the most mere promises to pay, there being, to the plaintiffs' knowledge, when they were given, no funds at defendant's credit to pay them.

*Held*, that judgment should be entered for the plaintiffs, with a reference to the Master to take the accounts. The defendant did not recall the cheques or stop payment of them. They were given to the plaintiffs as creditors of the defendant, and not as his bankers. They were in effect directions to the plaintiffs as the defendant's bankers to pay the amounts to themselves as his creditors as soon as there should be available funds at his credit with them. as his bankers, to pay them with, and they were in fact paid out of such funds when available; and the defendant could not recover the excess over seven per cent.

From the 31st January, 1902, the plaintiffs could charge the defendant with interest at the rate of five per cent. only, that being the legal rate.

*J. S. Tupper*, K.C., and *G. D. Minty*, for the plaintiffs.

*A. Haggart*, K.C., and *H. Whitla*, for the defendant.

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[PERDUE, J., 10TH OCTOBER, 1903.]

*In re* CANADIAN PACIFIC R. W. CO. AND LECHTZIER.

*Landlord and tenant—Overholding tenant—"Colour of right."*

Summary application for possession of land under the Landlord and Tenant Act, R. S. U. 1902 c. 93.

An agreement dated the 4th May, 1900, was entered into whereby Lechtzier acknowledged that he was a weekly tenant of the premises in question to C. S. Hoare, and agreed that his lease might be terminated at any time by "the party of the first part" (evidently an error for "the party of the second part") or by J. Osborne or J. A. M. Aikins, whom Lechtzier acknowledged to be the agents for that purpose of the party "of the first part," meaning Hoare. At that time the property was vested in Hoare, but he was merely a trustee for the railway company. Afterwards the property was conveyed to the company. At the time the notice to quit was served Lechtzier was tenant of the premises to the company

as landlords under the terms of the agreement of the 4th May, 1900. Notice to quit was served on Lechtzier on the 29th June, 1903, and demand of possession was served upon him on the 15th July following.

The tenant attempted to prove an understanding with S. Aikins, one of the agents of the landlords, by which he should be permitted to remain on the premises until the company should build on the land. It was urged that the tenant had a colour of right to the possession of the premises, and that his right could not be tried on this application.

*Held*, that the tenant occupied the premises in question under a lease from week to week, that it was duly terminated by the landlord, and that the tenant continued to overhold without colour of right after written demand of possession by the landlord. Order to issue for writ of possession. No costs.

If effect were given to the contention set up by Lechtzier that he should not be disturbed until the company should build on the land, he might, in case the company sold the land, or did not build upon it, be entitled to hold it perpetually. It was clear that the company did not authorize or assent to any such arrangement.

Whether there is colour of right or not, and what constitutes colour of right, are matters of law to be determined by the Judge: *Wright v. Mattison*, 59 U. S. R. 50. To constitute a colour of right there must be some *bona fide* question of right to be tried: *Price v. Guinane*, 16 O. R. 264. The tenant had not shewn any claim which should be construed as a colour of right.

*H. A. Robson*, for the landlords.

*A. J. Andrews*, for the tenant.

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## BRITISH COLUMBIA.

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### In the Supreme Court.

[FULL COURT, 19TH JANUARY, 1908.]

HUTCHINS v. BRITISH COLUMBIA COPPER CO.

*County Court—Practice—Setting aside judgment and granting new trial.*

Appeal from an order of LEAMY, Co.J., setting aside judgment and granting a new trial on the ground that the verdict of the jury was against the weight of evidence.

*Held*, that a County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict: he is to be guided in granting a new trial by the same principles as the full Court.

Appeal allowed.

*E. P. Davis*, K.C., for the appellant.

*L. G. McPhillips*, K.C., for the respondents.

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[FULL COURT, 8TH APRIL, 1908.]

MCLEOD v. CROW'S NEST PASS COAL CO.

*Practice—Test action—Substitution of another action as test action.*

Appeal from an order of WALKEM, J., refusing to substitute another action for an action already ordered to be tried as a test action.

After one of a number of actions brought by different plaintiffs against the same defendants in respect of causes of action which were identical has been ordered to be tried as a test action, the Court has power to substitute another action as a test action.

Twenty-nine actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on the plaintiffs' application an order for a test action was made, the order providing that the defendants, if dissatisfied with the result of the test action, might apply to have the other actions proceeded with, and that they might apply to have any of the actions forthwith proceeded with, if there existed any special ground of defence applicable to it, and not raised in the test action. After obtaining the order, the plaintiffs' solicitor discovered that, on account of the particular place in the mine at which McLeod was killed, a separate defence not applicable to the other cases might apply, and an application was made for the substitution of another action as the test action.

*Held*, reversing the decision of WALKEM, J., who held that there was no jurisdiction to substitute another action, that the object of the order, which was provisional in its nature, was to have a fair test action, and, as the one chosen would not be a fair one, another should be chosen.

Appeal allowed.

*S. S. Taylor*, K.C., for the appellants.

*E. P. Davis*, K.C., for the respondents.

[FULL COURT, 4TH NOVEMBER, 1908.]

## ROSS v. THOMPSON.

*Water rights—Decision of Gold Commissioner—Appeal from—Evidence on  
—Petition—Trial.*

Appeal from decision of FORIN, Co. J., refusing to hear new evidence on an appeal before him under s. 36 of the Water Clauses Consolidation Act, which provides that the appeal should be in the form of a petition setting forth the facts and law relied on, which petition, along with an affidavit verifying it, should be filed and served, and to which the respondents should file and serve their answer.

*Held*, that the fact that there was to be a petition and an answer contemplated the raising of issues, and that the appeal should be a trial *de novo*. Appeal allowed with costs.

*S. S. Taylor*, K.C., for the appellant.

*Charles Wilson*, K.C., for the respondent.

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[MARTIN, J., 3RD OCTOBER.]

## REX v. HAYES.

*Criminal law—Grand jury—Constitution of—Criminal Code, s. 656—Jurors  
Act Amendment Act, 1899, s. 2.*

Motion to quash an indictment on the ground that thirteen grand jurors had not been returned, as required by s. 2 of the Jurors' Act Amendment Act, 1899.

A sheriff, when about to summon, pursuant to s. 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented, and did not summon him.

*Held*, that the grand jury was not legally constituted, and that an indictment found by the jurors who had been summoned must be quashed.

A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of s. 656 of the Criminal Code.

*Duff*, K.C., *Peters*, K.C., and *G. E. Powell*, for the accused.

*Davis*, K.C., and *Harold Robertson*, for the Crown.

# THE CANADIAN LAW TIMES.

## ANNUAL DIGEST, 1903.

### ABANDONMENT.

See BANKRUPTCY AND INSOLVENCY, I.—  
NOTICE OF INSCRIPTION.

### ABORTION.

See CRIMINAL LAW, II. 1, III. 6.

### ACCELERATION.

See LIMITATION OF ACTIONS, II. 3—VEN-  
DOR AND PURCHASER, 1.

### ACCIDENT INSURANCE.

See INSURANCE, I.

### ACCORD AND SATISFACTION.

See BILLS OF EXCHANGE AND PROMIS-  
SORY NOTES, 13.

### ACCOUNT.

1. **Action on**—*Neglect to file*—*Order*.]—A plaintiff, who sues upon an account without filing it, and whose declaration is in general terms, will be ordered upon motion of the defendant to file his account, and to serve a copy upon the defendant. *Lachine Rapids Co. v. Hemond*, 5 Q. P. R. 133.

2. **Co-heirs**—*Form of action*.]—An heir has no right to sue one of his co-heirs *en reddition de compte*, but the only action which he can bring is an action *en compte et partage*. *Renaud v. Del-fausse*, 5 Q. P. R. 230.

3. **Extra-judicial accounts**—*Form*—*Administration*—*Reformation of account*—*Action en reddition*.]—The rendering of an account divided into distinct heads of receipts, disbursements, and balances, is only required by law in the case of accounts which are rendered in the cause in pursuance of a judgment. No particular form is necessary for extra-judicial accounts, and it is sufficient if they give such details in regard to their subject as will make it possible to check them. 2. When an account of an administration is rendered, the person to whom it is rendered has no right, upon the ground that it is incomplete or inexact, to begin an action *en reddition de compte*; he should proceed by way of action for reformation of the account. *Beaudry v. Prevost*, Q. R. 22 S. C. 32.

See ARBITRATION AND AWARD, 1—ARREST, III. 7—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—DISCOVERY, I. 3—INTEREST, 2—LIMITATION OF ACTIONS, II. 1—LIS PENDENS, 2—MISTAKE—PARTICULARS, 1. 2—PARTNERSHIP, 2—PLEADING, IV. 1.

### ACQUIESCENCE.

See APPEAL, X. 6—BANKRUPTCY AND INSOLVENCY, I. 7—CERTIORARI, 1—COSTS, I. 2—EXECUTION, IV. 2—PILOTS, 2—SOLICITOR, 2—TENANTS IN COMMON—WATER AND WATER-COURSES, 5.

### ACTION.

**Dismissal for want of prosecution**—*Party in default*—*Costs*.]—1. A party interested who is bound to continue a suit is not entitled to a *mise en demeure*, the law itself putting him in default to do

so.—2. When a continuance of suit is not effected by the party interested, the party remaining in the case may bring an action to compel him to continue the suit, without any previous demand, and is entitled to the costs of such suit. Judgment in Q. R. 21 S. C. 48 reversed as to costs. *Arcand v. Yon*, Q. R. 22 S. C. 502.

See COMPANY, III. 3—CONSOLIDATION OF ACTIONS—COSTS—COURTS—DAMAGES—DEFAMATION, I. 1, 2—DISCOVERY—EVIDENCE—FENCES—HUSBAND AND WIFE, VI.—INSURANCE, III. 1—NOTICE OF ACTION—PARTICULARS—PARTIES—PEREMPTION—RAILWAY, VII. 3—TRIAL—WATER AND WATERCOURSES, 4.

### ADMINISTRATION.

See ACCOUNT, 3—DISTRIBUTION OF ESTATES—EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE, VIII. 1—WILL, I.

### ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

### ADMISSIBILITY OF EVIDENCE.

See EVIDENCE, I.

### ADMISSIONS.

See CONTRACT, VIII. 4—COSTS, VII. 3—EVIDENCE, I. 1, 2—PARTICULARS, 6—PRINCIPAL AND AGENT, 4.

### ADVERTISING.

See CRIMINAL LAW, II. 1.

### ADVOCATE.

See COSTS, I. 4, III. 1, 2—CROWN, IV. 2—PARTNERSHIP, 1—PROCURATION—SOLICITOR.

### AFFIDAVITS.

See ARREST, III. 1, 2, 3, 4—ATTACHMENT OF GOODS—BILLS OF EXCHANGE AND PROMISSORY NOTES, 6—CRIMINAL LAW, III. 11—DISCOVERY, II. 2, 3, 4—DISTRIBUTION OF ESTATES, 2—EVIDENCE, II.—INJUNCTION, 7—JUDGMENT DEBTOR, 3—MECHANICS' LIENS, 1—MINES AND MINERALS, 2—MUNICIPAL CORPORATIONS, IX. 3—MUNICIPAL ELECTIONS, 1, 2—NEW TRIAL—OP-

POSITION, 7—PLEADING, VII. 6—REPLEVIN, 1—WRIT OF SUMMONS, I. 1, 11.

### AGENCY.

See PARLIAMENTARY ELECTIONS, I—PRINCIPAL AND AGENT.

### ALDERMEN.

See MUNICIPAL ELECTIONS, 11.

### ALIENS.

1. *Transportation* — *Railway company—Habeas corpus.*]—Chinese immigrants not included in the privilege established by law concerning Chinese immigrants brought from their own country to the American frontier upon the representation made by them that they had the right to enter the United States, which is afterwards refused to them by the United States authorities, cannot afterwards upon *habeas corpus* obtain their release from the custody of the railway company transporting them and desiring to take them back to their own country. *Chew v. Canadian Pacific R. W. Co.*, 5 Q. P. R. 453.

2. Chinese immigrants who are refused admission in the United States, and do not appeal from the decision so rendered against them, are not entitled to a writ of *habeas corpus*, while being transported from the United States to China, in conformity with the agreement between the United States and the Canadian Pacific Railway Company. *Chew v. Canadian Pacific R. W. Co.*, 6 Q. P. R. 14.

See CONSTITUTIONAL LAW, 1—CRIMINAL LAW, II. 5—TRADE MARK, 2.

### ALIMENTARY ALLOWANCES.

See ATTACHMENT OF DEBTS, I. 1, 2, 4.

### ALIMONY.

See HUSBAND AND WIFE, I.

### ALMS HOUSE.

See MUNICIPAL CORPORATIONS, XVI. 3.



**AMENDMENT.**

See **APPEAL**, II. 1, IV., X. 4—**ARREST**, III. 1—**BANKS AND BANKING**, 1, 4—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2, 3, 7—**COMPANY**, III. 5, IV. 3—**CONTRACT**, VIII. 2—**COSTS**, VII. 2—**CRIMINAL LAW**, II. 5, 15, IV. 3—**JUSTICE OF THE PEACE**, 3—**LANDLORD AND TENANT**, III. 17, VI. 1—**LIQUOR ACT OF ONTARIO**, 1—**MALICIOUS PROSECUTION**, 5—**MINES AND MINERALS**, 5—**MUNICIPAL CORPORATIONS**, I. 1, IX. 4, XV. 2, XVI. 9—**MUNICIPAL ELECTIONS**, 3—**OPPOSITION**, 11—**PARTICULARS**, 1—**PLEADING**, V.—**PRINCIPAL AND AGENT**, 3—**RAILWAY**, II. 1—**SALE OF GOODS**, IV. 1—**WRIT OF SUMMONS**, I. 8.

**ANIMALS.**

See **NEGLIGENCE**, 1, 2—**RAILWAY**, IV.

**ANNUITY.**

See **SHERIFF**, 1—**WASTE—WILL**, II. 3, 7.

**APPEAL.**

- I. **BRITISH COLUMBIA — APPEAL TO COUNTY COURT.**
- II. **BRITISH COLUMBIA — APPEAL TO SUPREME COURT.**
- III. **NEW BRUNSWICK — APPEAL TO SUPREME COURT.**
- IV. **NORTH-WEST TERRITORIES — APPEAL TO SUPREME COURT.**
- V. **NOVA SCOTIA — APPEAL TO SUPREME COURT.**
- VI. **ONTARIO — APPEAL TO COURT OF APPEAL.**
- VII. **ONTARIO — APPEAL TO DIVISIONAL COURT.**
- VIII. **QUEBEC — APPEAL TO COURT OF KING'S BENCH.**
- IX. **QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.**
- X. **SUPREME COURT OF CANADA.**

See **BILLS AND NOTES**, 3—**CHAMPERTY—CONSTITUTIONAL LAW**, 11—**CONTEMPT OF COURT**, 3, 5—**CONTRACT**, III. 2—**COSTS**, V. 3, VI. 6, VIII. 1—**COURTS**, IX. 1, 6—**CRIMINAL LAW**, IV. 1, 2—**EVIDENCE**, IV. 2—**EXECUTION**, IV. 1, 5—**INJUNCTION**, 5—**JUDGMENT**, IV. 3—**JUDGMENT DEBTOR**, 3—**LUNATIC**, 2, 3—**PARLIAMENTARY ELECTIONS**, IV.—**PLEADING**,

IX. 1, 2—**PRIVY COUNCIL**, 1, 2—**REFEREES AND REFERENCES**, 3—**SALE OF GOODS**, IV. 2, V. 2—**WATER AND WATER-COURSES**, 9.

### I. **BRITISH COLUMBIA — APPEAL TO COUNTY COURT.**

**From summary conviction—Notice of appeal—Description of offence.]**—A notice of appeal from a conviction for playing in a common gaming house, which describes the offence for which the appellant was convicted as "looking on while another was playing in a common gaming house," is insufficient. *Rea v. Mah Yin*, 9 Brit. Col. L. R. 319.

### II. **BRITISH COLUMBIA—APPEAL TO SUPREME COURT.**

**1. Amending Judge's notes of evidence.]**—On the hearing of an appeal from the decision of a County Court Judge, counsel for the appellant applied to introduce further evidence alleged to have been omitted from the Judge's notes of evidence taken at the trial.—The Court refused the application, holding that where a party desires to introduce, on an appeal, evidence alleged to have been omitted from the Judge's notes of evidence, he should first apply to the Judge to amend his notes. *Rendell v. McLellan*, 23 Occ. N. 57, 9 Brit. Col. L. R. 328.

**2. Costs — Appeal partly successful.]**—An appellant who is substantially successful is entitled to the costs of appeal. The fact that a respondent is successful in some parts is not sufficient to deprive an appellant who is substantially successful of his costs. *Centre Star Mining Co. v. Rossland Miners' Union*, 23 Occ. N. 272.

**3. Introducing fresh evidence on appeal.]**—Motions by the appellants to admit in the full Court further evidence on the hearing of appeal from a judgment at the trial were dismissed.—Held, that an application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant indicating the evidence desired to be used, and setting forth when and how the applicant came to be aware of its existence, what efforts, if any, he made to have it adduced at the trial, and that he is advised and believes that if it had been so adduced, the result would probably have been different. *Marino v. Sproat*, 23 Occ. N. 31, 9 Brit. Col. L. R. 385.

**4. Right of appeal—Decision of Judge on appeal from Court of Revision—Preliminary objection—Costs.]—See *In re Vancouver Incorporation Act and Rogers*, 23 Occ. N. 72, 9 Brit. Col. L. R. 373.**

**5. Right of appeal—Party interested—Who is—Rivers and Streams Act, s. 12.]—Section 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County Court Judge he may appeal to the Supreme Court:—*Held*, that "party interested" means one who was a party to the proceedings before the Judge appealed from. *In re Smith*, 23 Occ. N. 58, 9 Brit. Col. L. R. 329.**

**6. Time—Date of decision—Entry of order.]—An order deciding a garnishee issue was dated the 26th March, settled by the Judge on the 15th July, and entered on the 25th July. Notice of appeal was served on the 19th July:—*Held*, that the appeal was brought in time. *Manley v. Mackintosh*, 10 Brit. Col. L. R. 84.**

**7. Time—Extension—Yukon appeal—Jurisdiction—Judgment, final in part and interlocutory in part.]—By the Yukon Territory Act (62 & 63 V. c. 11), the Supreme Court of British Columbia sitting together as a full Court is constituted a Court of appeal from final judgments of the Territorial Court, and it is provided that a notice of appeal shall be given within twenty days after judgment. From interlocutory orders or judgments there is no appeal:—*Held*, by the Supreme Court of British Columbia, sitting as a full Court, that it had no jurisdiction to extend the time for appealing.—*Per HUNTER, C.J., and DRAKE, J.*:—In an action embracing several causes of action there may be a judgment or order which is final as to one cause of action and interlocutory as to others, and a party dissatisfied with the part which is final must appeal within the time limited for appealing from final orders, and cannot question its correctness in an appeal from the judgment at the conclusion of the whole action. *Belcher v. McDonald*, 23 Occ. N. 141, 9 Brit. Col. L. R. 377.**

**8. Time—Extension after expiry—Jurisdiction.]—On this appeal the question of the Court's jurisdiction to extend the time limited for appeal after the time limited had once expired came up, and counsel for the appellant wished to argue that the Court had such jurisdiction and that the decision in *Sung v. Lung*, 8 Brit. Col. L. R. 423, was wrong. The Court announced that, if it became necessary to decide the point, all the Judges would be summoned to hear argument.—A deci-**

sion on the point was not necessary, so it was not argued. *Noble Five Mining Co. v. Last Chance Mining Co.*, 23 Occ. N. 252, 9 Brit. Col. L. R. 514.

### III. NEW BRUNSWICK—APPEAL TO SUPREME COURT.

**Right of appeal—County Court—Decision of Judge.]—Where questions of fact, which have not been passed upon by the Judge below, are not involved, an appeal will lie directly to the Supreme Court from a decision of a County Court Judge. *Patterson v. Larsen*, 36 N. B. Reps. 4.**

### IV. NORTH-WEST TERRITORIES—APPEAL TO SUPREME COURT.

**Notice of appeal—Amendment—Special leave.]—Notwithstanding that the case is of such a character as to require special leave to appeal, the Court *in banc* has power to amend the notice of appeal by adding a ground not taken when leave was granted; such an amendment is a matter for the exercise of the discretion of the Court, and such discretion will not, in such a case, be exercised without very great precautions. *Western Milling Co. v. Darke*, 2 Terr. L. R. 40.**

### V. NOVA SCOTIA—APPEAL TO SUPREME COURT.

**County Court appeal—Findings of jury—Necessity for intermediate application.]—An appeal was taken directly to the Supreme Court of Nova Scotia from the findings of the jury in a case tried in a County Court:—*Held*, following *Belden v. Freeman*, 21 N. S. Reps. 106, that there should have been an application in the first instance to the Judge of the County Court for a new trial, and that the appeal should have been from his decision on that application, and that the present appeal must be quashed. *White v. Hissie*, 35 N. S. Reps. 432.**

### VI. ONTARIO—APPEAL TO COURT OF APPEAL.

**Leave to appeal—Question of costs—Solicitor—Payment by salary—Taxation of costs against opposite party—Right to costs—Municipal corporation—By-law.]—The solicitor of a municipal corporation was appointed under the terms of a by-law which provided for his**

receiving a yearly salary of \$1,800 for all services performed by him, including costs of litigation incurred on behalf of the corporation, and any costs awarded to the corporation were to be paid over to the city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should be paid to the solicitor as part of his remuneration, in addition to his salary. After the passing of the amending by-law the corporation claimed to have the right to tax profit costs in an action against the corporation, which had been dismissed with costs by a judgment given before the passing of such amending by-law.—Leave to appeal to the Court of Appeal from an order of a Divisional Court (22 Occ. N. 408, 4 O. L. R. 656) refusing to allow such profit costs, having been moved for:—*Held*, that, having regard to the litigation and the decisions on the subject, leave should not be granted.—*Semble*, that the date of the judgment governed the plaintiffs' liability to costs. *Ottawa Gas Co. v. City of Ottawa*, 23 Occ. N. 87, 5 O. L. R. 246.

**2. Leave to cross-appeal *nunc pro tunc*—Parties—Costs.**—*McDermott v. Hickling*, 23 Occ. N. 40.

**3. Time—Late entry—Refusal of consent—Confirmation—Responsibility for delay—Costs.**—The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on the 22nd April, and gave security on the 22nd May. Reasons for appeal were not served till the 10th September, and reasons against appeal not till the 13th October. The next sittings of the Court of Appeal was set for the 10th November. The appeal case was not prepared in time to enter the case on the 6th November, and the plaintiff's solicitor refused to consent to its being entered on the 10th for the sittings beginning on that day. The case was entered without consent on the 17th November, and a motion was made to confirm the entry:—*Held*, that the plaintiff's solicitor should have consented to the proposed entry on the 10th November, and the subsequent entry should be confirmed; and, as both parties were nearly equally blameable for delay, there should be no costs. *McLaughlin v. Mayhew*, 23 Occ. N. 42, 5 O. L. R. 114.

See CRIMINAL LAW. III. 4—PARLIAMENTARY ELECTIONS, II. 1, III. 4.

## VII. ONTARIO—APPEAL TO DIVISIONAL COURT.

**1. County Court appeal—Final order.**—A motion by the defendant to set

aside a judgment for default of defence in a County Court action as irregular and void, was dismissed by the County Court Judge, who gave the defendant leave, on payment of \$5, to move on the merits for leave to defend:—*Held*, that this was a final order and that an appeal lay therefrom. *O'Donnell v. Guinane*, 28 O. R. 389, distinguished. *Voight Brewery Co. v. Orth*, 23 Occ. N. 168, 5 O. L. R. 443.

**2. County Court appeal—Right of appeal—Order refusing to vary minutes of judgment—Duty of Judge to certify proceedings—Set-off of costs.**—An order of a County Court Judge in an action in a County Court dismissing an application to vary minutes under Con. Rule 625 (2) is an interlocutory and not a final order; and no appeal lies from it to the High Court. *Semble*, per BRITTON, J., in Chambers, that the fact that there may be no appeal from such an order is no reason why the Judge should not certify the papers; the question whether or not there is an appeal from such an order is for the Court appealed to, and such certificate should as a rule be given upon request; the Judge's duty being ministerial only.—*Semble*, also, that the setting off of costs (which was the matter in question on the motion to vary the minutes) is no part of what is ordinarily understood as settling minutes of judgment.—A motion for a mandamus to the Judge to certify the proceedings was dismissed by BRITTON, J., and the dismissal was affirmed by the Court. *In re Taggart v. Bennett*, 23 Occ. N. 224, 6 O. L. R. 74.

See ARBITRATION AND AWARD, 2.

## VIII. QUEBEC—APPEAL TO COURT OF KING'S BENCH.

**1. Right of appeal—Final or interlocutory judgment—Husband and wife—Separation—Construction of will—Reference.**—In an action for separation from bed and board, a judgment holding that a provision in the will of the defendant's father, that the movable and immovable properties bequeathed may not in any manner be liable for the support and maintenance of his wife, does not provide for the exclusion of said properties from the community then on the death of the testator existing between the parties, and ordering the report to be referred back to the practitioner appointed by the Court to take an inventory of the property and assets of the community of property existing between the plaintiff and defendant, and ordering the said practitioner to

include therein the properties and immovable effects belonging to the said estate, and revenues thereof derived from the movable property from the time of the testator's death to the time of the dissolution of the community of property, is an interlocutory judgment not falling under the condition imposed by paragraph 2 of Art. 46, C. P., and may be remedied by a final judgment. *Stewart v. Cairns*, 5 Q. P. R. 235.

**2. Right of appeal—Municipal matters—Interlocutory judgment.]**—Article 1006, C. O. P., which states that no appeal lies to the Court of King's Bench from any final judgment rendered under the provisions of c. 40 in matters relating to municipal corporations and offices, also excludes an appeal from an interlocutory judgment in such matters. *County of Wright v. Tremblay*, Q. R. 12 K. B. 368.

**3. Security — Time — Extension.]**—After the expiration of the time fixed by law and the order of a Judge for furnishing security on appeal, a motion to extend the time will not be granted. *Larocque v. Rosenthal*, 5 Q. P. R. 386.

#### IX. QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.

**1. Security for costs — Deposit—Amount involved.]**—The amount in litigation spoken of in Art. 1196, C. P., must exceed the amount due under the judgment for principal, and does not include the amount of costs. 2. In the case of an appeal by the defendant to the Court of Review from a judgment for less than \$400 in an action brought for a sum greater than \$400, the amount in litigation is less than \$400, and the deposit necessary is \$50. *Saunders v. United Factories Limited*, 6 Q. P. R. 34.

**2. Security for costs — Deposit — Title to land—Amount involved.]**—The plaintiff sued to obtain a good title to a property which he alleged that he had bought from the defendant at the price of \$150 and improvements, which he alleged were worth \$350:—*Held*, that he must, under Art. 1106, C. P., make a deposit of \$75 to obtain a review of the judgment dismissing his demand. *David v. Chenevert*, 6 Q. P. R. 24.

See PLEADING, VII. 3.

#### X. SUPREME COURT OF CANADA.

**1. New questions raised on appeal—Jurisdiction of Court below.]**—

Questions of law appearing upon the record, but not raised in the Court below, may be relied upon for the first time on an appeal to the Supreme Court of Canada, where no evidence in rebuttal could have been brought to affect them had they been taken at the trial. *Gray v. Richford*, 2 S. C. R. 431, and *Scott v. Phœnix Assurance Co.*, Stu. K. B. 354, followed. —An objection that a Judge of the Court below had no jurisdiction to render a judgment from which an appeal is asserted, is not proper ground on which to question the jurisdiction of the appellate Court to entertain the appeal. *McKelvey v. Le Roi Mining Co.*, 23 Occ. N. 61, 32 S. C. R. 664.

**2. Questions of fact.]**—There is no rule of law or of procedure which prevents the Supreme Court or an intermediate Court of appeal from reversing the decision at the trial on the facts. In an action for the price of a tombstone, the defence was that it was not of the design ordered. The trial Judge dismissed the action, but his judgment was reversed by the Court of Appeal (1 O. W. R. 602); and the Supreme Court of Canada affirmed the reversal. *Lewis v. Dempster*, 23 Occ. N. 179, 33 S. C. R. 292.

**3. Questions of fact—Concurrent findings of Courts below.]**—A judgment based on concurrent findings of fact in the Courts below ought not to be disturbed on appeal to the Supreme Court of Canada if the evidence be contradictory. *D'Avignon v. Jones*, 32 S. C. R. 650.

**4. Questions of fact—Concurrent findings of Courts below—Irrregularities at trial—Amendment.]**—Where the finding of the trial Judge was manifestly erroneous, though affirmed by a Provincial appellate tribunal, and the trial appeared to have been irregularly conducted, the Supreme Court of Canada reversed the judgments and disapproved the rulings refusing leave to amend the statement of claim by alleging an account stated. *Belcher v. McDonald*, 33 S. C. R. 321.

**5. Right of appeal—Amount in controversy—Contrainte par corps — Insolvent.]**—On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding \$2,000, the order appealed from condemned the appellant, under Art. 888, C. P. Q., to three months' imprisonment for sequestration of a portion of his insolvent estate, to the value of at least \$6,000:—*Held*, that there was no pecuniary amount in controversy, and there could be no appeal to the Supreme Court of Canada. *Clement v. Banque Nationale*, 33 S. C. R. 343.

**6. Right of appeal—Matter in controversy—Removal of executors—Acquiescence in judgment.]**—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors, though, by the action, an account for over \$2,000 had been demanded and refused by the judgment at the trial, against which the plaintiff had not appealed. *Noel v. Chevrefils*, 30 S. C. R. 327, followed. *Laberge v. Equitable Life Assurance Society of the United States*, 24 S. C. R. 59, distinguished. *Donohue v. Donohue*, 23 Occ. N. 147, 33 S. C. R. 134.

**7. Right of appeal—Order for security—Final judgment.]**—A judgment granting a motion ordering an opposant *à fin de charge* to give security that the real estate advertised for sale will be sold for a sufficient price to enable the hypothecary creditors to be paid in full, is an interlocutory judgment, and a Judge of the Court of King's Bench cannot grant leave to appeal therefrom to the Supreme Court of Canada. *Desaulniers v. Payette*, 5 Q. P. R. 364.

**8. Right of appeal—Order for security—Final judgment.]**—An order requiring opposants *à fin de charge* to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is not a final judgment, and no appeal lies from it to the Supreme Court of Canada. *Desaulniers v. Payette*, 33 S. C. R. 340.

**9. Right of appeal—Possessory action—Landlord and tenant—Rent.]**—In a possessory action, with conclusions for \$200 damages, the defendant admitted the plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed a judgment dismissing the possessory conclusions and adjudging \$200 for rent:—*Held*, that the defendant had no right of appeal to the Supreme Court of Canada. *Davis v. Roy*, 33 S. C. R. 345.

**10. Right of appeal—Recusation of arbitrator.]**—No appeal lies to the Supreme Court of Canada from a judgment of the Court of Queen's Bench, confirming a judgment of the Superior Court, which dismissed a recusation of an arbitrator appointed in an expropriation by a railway company. *Vallee Est du Richelieu R. W. Co. v. Menard*, 5 Q. P. R. 179.

**11. Right of appeal—Yukon Territorial Court—Decisions of Gold Commissioner—Finality of judgment—Mining**

**lands.]**—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the court of appeal constituted by the Ordinance of the Governor in Council, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor in Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 V. c. 11 (D.) *Hartley v. Matson*, 23 Occ. N. 39, 32 S. C. R. 575.

**12. Special leave—Error in judgment—Concurrent jurisdiction—Mandamus—Malicious prosecution.]**—Special leave to appeal from a judgment of the Court of Appeal for Ontario, under s. 1 (c) of 60 & 61 V. c. 34, will not be granted on the ground merely that there is error in such judgment.—Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused.—The Ontario Courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S., having been refused such fiat, applied for a writ of mandamus, which a Divisional Court granted (21 Occ. N. 432, 2 O. L. R. 315), and its judgment was affirmed by the Court of Appeal (22 Occ. N. 360, 4 O. L. R. 394):—*Held*, that the mandamus having been granted, the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal, though it might have had the writ been refused.—The question raised by the proposed appeal is, if not one of practice, a question of the control of Provincial Courts over their own records and officers, with which the Supreme Court should not interfere. *Attorney-General v. Scully*, 23 Occ. N. 60, 33 S. C. R. 16.

**13. Special leave—Forum.]**—A Judge of the Supreme Court of British Columbia may grant special leave for an appeal to the Supreme Court of Canada although he did not sit as a member constituting the full Court which rendered the judgment appealed from. *Oppenheimer v. Brakman and Ker Milling Co.*, 32 S. C. R. 699.

**14. Time—Extension—Intention to appeal.—Suspension of proceedings—Merits.]**—Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court, the applicant must shew a *bona fide* intention to appeal held while the right to appeal existed, and a suspension of further proceedings by reason of some special circumstances in consequence of which they were held in abeyance. No such case having been made out, and the Court not

being impressed with the merits of the defence, leave to extend the time was refused to two defendants. *In re Manchester Economic Building Society*, 24 Ch. D. 488, followed. *Smith v. Hunt*, 23 Occ. N. 42, 5 O. L. R. 97.

See DAMAGES, 1 — PARLIAMENTARY ELECTIONS, II. 7, 11, III. 5.

## APPORTIONMENT.

See DAMAGES, 5 — VENDOR AND PURCHASER, 5 — WASTE.

## APPRENTICE.

See PILOTS, 1, 3.

## APPROPRIATION OF PAYMENTS.

See CONTRACT, III. 2 — PRINCIPAL AND SURETY, 2 — TRUSTS AND TRUSTEES, 2.

## ARBITRATION AND AWARD.

1. **Accounts of Province of Canada—Common school fund and lands—Jurisdiction of arbitrators—Deed of submission—Construction.**—By agreement of submission dated the 10th April, 1893, the Provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the common school fund and the method of computing" interest thereon, and of the amount for which Ontario was liable. The fund was established by 12 V. c. 200 (C.), and consisted (inter alia) of the proceeds of public lands received by Ontario and paid to the Dominion:—*Held*, that a claim by Quebec that Ontario should be debited with uncollected prices of land sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not, on its true construction, included therein. Judgment in 31 S. C. R. 516, *sub nom. Province of Quebec v. Province of Ontario and Dominion of Canada, In re Common School Fund and Lands*, reversed and award of arbitrators restored. *Attorney-General for Ontario v. Attorney-General for Quebec*, [1903] A. C. 39.

2. **Appointment of sole arbitrator — Submission — Arbitration Act —**

*Appeal—Order of Judge in Chambers.*—A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."—*Held*, reversing the decisions of a Divisional Court, 3 O. L. R. 93, 22 Occ. N. 94, and of STREET, J., 2 O. L. R. 301, 21 Occ. N. 532, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R. S. O. 1897 c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator.—*Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls*, 2 O. L. R. 585, 21 Occ. N. 595, approved.—*Held*, also, that the order of STREET, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as *persona designata*, but was a judicial order from which an appeal lay. *Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, In re Faulkner*, 23 Occ. N. 215, 5 O. L. R. 609.

3. **Building contract — Completion of work — "All matters in dispute" — Arbitrators—Delegation of duty.**—The action was to recover a balance on a building contract, alleging completion. The defendant denied completion, and counterclaimed against the plaintiff on several grounds.—After the record had been entered for trial the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the latter "all matters whatsoever in dispute" between them.—The arbitrators thus appointed having made their award in the plaintiff's favour, he moved, under Rules 754-764 of the King's Bench Act, to have the award made a judgment of the Court.—*Held*, dismissing the motion with costs, that the award was bad on the following grounds:—1. It shewed on its face that the work under the plaintiff's contract had not been completed, so that the plaintiff was not entitled to recover anything at all in this action.—2. From evidence taken on the hearing of the motion it was clear that the arbitrators had not taken into consideration "all matters whatsoever in dispute," but had failed to deal with a number of such matters which had been brought to their attention.—*Boues v. Fernie*, 4 My. & Cr. 150, *Watkinson v. Page*, 1 Hare 276, and *Russell on Arbitration*, 8th ed. p. 172, followed.—3. The arbitrators had attempted to delegate

to another person (unascertained) their authority to decide whether the sum of \$110, part of the amount awarded, should or should not be paid: see *Tandy v. Tandy*, 9 Dowl. 1044. *Blakeston v. Wilson*, 23 Occ. N. 27, 14 Man. L. R. 271.

**4. Leave to enforce award—Time**—*Motion to set aside.*]—An application under s. 13 of the Arbitration Act, R. S. O. 1897 c. 62, for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award.—Section 45 of the Act does not apply to such an application, but only to applications to set aside awards.—An order under s. 13 is necessary when the reference has been made out of Court.—Objections properly the subject of a motion to set aside the award were not considered upon appeal from an order under s. 13. *In re Lloyd and Pegg*, 23 Occ. N. 171, 5 O. L. R. 389.

**5. Remitting to arbitrators—Incompetency of arbitrator**—*Appointing new arbitrator.*]—Section 11 of the Arbitration Ordinance provides that "in all cases of reference to arbitration the Court or a Judge may, from time to time, remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." Remission was refused because after the submission was entered into one of the arbitrators commenced an action against the party who had nominated him, to recover an amount agreed to be paid for procuring settlement of the matters in dispute.—Where the instrument of submission names the arbitrators, the Court or Judge has no power to appoint a new arbitrator in lieu of one who has become incompetent. *Re Crawford and Allen*, 5 Terr. L. R. 398.

**6. Setting aside award.**—*Misconduct of arbitrator—Waiver.*]—A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award.—Where two out of three arbitrators go on and hold a meeting, and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator, and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards.—*Per HUNTER, C.J.*—It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reason-

able doubt raised in the judicial mind that all was not fair in the conduct of one or more of the arbitrators. *In re Doberer and Megaw's Arbitration*, 23 Occ. N. 272, 10 Brit. Col. L. R. 48.

**7. Stated case**—*Matter "arising in the course of the reference"*—*Construction of contract—Revoking submission—Discretion—Special qualifications of arbitrators—Questions of law.*]—Arbitrators were appointed under the arbitration clause in an agreement between two companies, whereby, inter alia, one agreed to provide the other daily with a certain quantity of cordwood, which the latter agreed to carbonize into charcoal and to deliver to the former to the maximum quantity of 85,000 bushels per month. The arbitration clause provided that in case of any dispute in regard to the meaning or construction of the agreement or of the mutual obligations of the parties or of any other act, matter, or thing relating to or concerning the carrying out of the true spirit, intention, or meaning of the agreement, the same should be determined by arbitration. One of the claims referred to the arbitrators was for damages for short delivery of charcoal, a shortage being claimed whatever the proper construction of the agreement in that regard. On an application by one of the parties, under s. 41 of the Arbitration Act, R. S. O. 1897 c. 62, for a direction to the arbitrators to state a special case upon which the Court should determine the true construction of the contract as to the amount of charcoal called for per month under it—a matter upon which they had reached and announced a conclusion:—*Held*, that, the claim referred to leaving the proper construction of the agreement open, this was a question of law "arising in the course of the reference," within the meaning of s. 41, and a special case might properly be directed as to it. 2. That a special case having been directed as to the principal question, it might properly be made to include two other questions in dispute, though, had they been the only questions which the applicants desired to have stated, it would not have been proper to direct a case as to them. 3. A party to a reference is not entitled *ex debito justitiæ* to have a special case directed whenever a question of law arises in the course of a reference; it is a matter in the discretion of the Court. 4. There is no general rule that when the arbitrators are specially qualified to decide a question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question. *Semble*, that different considerations apply to the exercise of the discretion to give leave to revoke a submission (s. 3 of the same Act)—a discretion which is to be exercised only under exceptional circumstances. *In re Rathbun*

*Co. and Standard Chemical Co.*, 23 Occ. N. 66. 5 O. L. R. 286.

See APPEAL, X. 10—COMPANY, IV. 4—INSURANCE, II. 1, III. 1—INTEREST, 2—LANDLORD AND TENANT, III. 13, 19—RAILWAY, VII. 3—SCHOOLS, 2, 5.

## ARCHITECT.

See CONTRACT, I. — EVIDENCE, I. 2—LIMITATIONS OF ACTIONS, II. 2.

## ARREST.

I. IN NEW BRUNSWICK.  
II. IN NOVA SCOTIA.  
III. IN QUEBEC.

See APPEAL, X. 5—BANKRUPTCY AND INSOLVENCY, I. 14—CONTEMPT OF COURT, 5—GIFT, 7—JUDGMENT DEBTOR, 1—MALICIOUS PROSECUTION—MILITARY LAW—SHERIFF, 2.

### I. IN NEW BRUNSWICK.

**Privilege—Execution—Inferior Court**—*Action on limit bond—Assignment by sheriff on same day—Holiday—Sitting of Court.*—The arrest of a person, having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S., is not void, nor does such privilege afford any defence to an action on a limit bond entered into by such officer in order to obtain his discharge.—If two things are done upon the same day, it will be assumed that that which ought to have been first done was so done; therefore in an action upon a limit bond by the assignee of the sheriff, it was held, in the absence of proof to the contrary, that, though the assignment and the writ commencing the action were dated upon the same day, the bond was assigned before the writ was issued.—The assignment by the sheriff being a mere formality, only going to shew that the assignee was satisfied with the security, the date thereof was immaterial.—Where a Court was by statute bound to sit on a certain day in each week unless Christmas day, New Year's day, or any other legal holiday should fall upon such day:—*Held*, that a day proclaimed by the Governor-General and the Lieutenant-Governor as a holiday for a general public thanksgiving was a legal holiday within the meaning of the Act, and that the Court was not bound to sit upon such a day. *Dibblee v. Fry*, 35 N. B. Reps. 282.

### II. IN NOVA SCOTIA.

**Bail bond—Discharge—Exoneretur.**—Application for an order to deliver up the bond, given on the defendant's arrest, to be cancelled, the action having been dismissed:—*Held*, that the order should be for the entry of an *exoneretur* on the bond, not for the delivery up of the bond, following the old practice (*Allison v. Desbrisay, Cochrane* 19), there being no specific Rule in the Nova Scotia Judicature Act, on the subject. *Watson v. Leukten*, 23 Occ. N. 336.

### III. IN QUEBEC.

**1. Capias—Affidavit—Amendment—Time and place of debt.**—The affidavit required for the issuing of the writ of *capias* is not a proceeding susceptible of being amended. — 2. Such affidavit must mention the time and place where the indebtedness occurred, within the limits of the Provinces of Quebec and Ontario. *Julien v. Chuna*, 5 Q. P. R. 413.

**2. Capias—Affidavit—Debt.**—A *capias* will be quashed upon petition if the affidavit does not shew that the debt for which it was sued out is a personal debt, or if it does not indicate the place at which the debt was created or became exigible. *European Importing Co. v. Mallekson*, 5 Q. P. R. 255.

**3. Capias—Affidavit—“Immediately.”**—An affidavit for *capias* must set forth that the defendant is immediately about to leave the Provinces of Quebec and Ontario, and a *capias* issued upon an affidavit merely stating that the defendant is about to leave the said Provinces, will be quashed on petition to that effect. *Kidd v. MacKinnon*, 5 Q. P. R. 177.

**4. Capias—Affidavit—Residence of parties—Place where debt contracted.**—When it appears by the affidavit for *capias* that the plaintiff as well as the defendant resides in the Province of Quebec, it is not necessary to allege specially that the debt was contracted within the Province. *Beauchemin v. St. Pierre*, 5 Q. P. R. 484.

**5. Capias—Petition to quash—Deposit—Incidental capias—Declaration—Time.**—A petition to quash a *capias*, based not upon the grounds mentioned in Art. 919, C. P., but upon formal grounds, is subject to the deposit required with preliminary exceptions.—2. The declaration of an incidental *capias* must be deposited at the office of the Court within three days after service of the writ. *Radford v. Hickey*, 5 Q. P. R. 311.



**6. Capias — Security money — Payment over—Motion.]**—A plaintiff, who has succeeded upon a *capias*, cannot demand by motion that the deposit made with the sheriff by way of security shall be paid over to him. *Rosenberg v. Belan-kow*, 5 Q. P. R. 378.

**7. Contrainte par corps—Executor —Account.]**—Civil imprisonment of a testamentary executor will not be ordered in an action in contestation of his account and to recover the alleged share of the plaintiff in the *reliquat* of such account. *Morris v. Meahan*, 6 Q. P. R. 43.

**8. Contrainte par corps—Right to —Personal injuries—Accident.]**—Injuries caused by a simple accident resulting from the negligence of a person, without any intention on his part to injure, are not personal injuries on account of which coercive imprisonment can be ordered against such person. *Chartrand v. Smart*, Q. R. 23 S. C. 304, 5 Q. P. R. 173.

**9. Contrainte par corps — Writ—Exhaustion—Deputy-prothonotary.]**—A writ or order of the Court or Judge for coercive imprisonment is exhausted by the imprisonment of the debtor, followed by his liberation, and no new arrest or imprisonment can thereafter be executed in virtue of the said writ.—2. A writ or order for coercive imprisonment cannot be issued by a deputy-prothonotary of the Court, and an imprisonment effected in virtue thereof is illegal. *Gaudet v. Archambault*, 6 Q. P. R. 27.

## ARTICLES OF ASSOCIATION.

See COMPANY, I. 2.

## ASSAULT.

**Action for — Particulars.]**—The plaintiff sued for damages for an assault and battery on the 9th April, 1903, on the S. S. "Dahome," then being in Demerara; also for an assault and battery on board the "Dahome," then being on the high seas.—*Held*, that, as the month of April might cover an assault and battery other than that of the 9th, there ought to be particulars in order to prevent surprise at the trial. An assault is such an easy thing to commit that notice of the particular occasion should be given. *Watson v. Leukton*, 23 Occ. N. 247.

See COSTS, VI. 1—CRIMINAL LAW, III. 12, 18—RAILWAY, VI. 2.

## ASSESSMENT AND TAXES.

- I. ASSESSMENT ROLL.
- II. CHARGE ON LAND.
- III. DISTRESS FOR TAXES.
- IV. EXEMPTIONS.
- V. STATUTE LABOUR.
- VI. TAX SALE.
- VII. VALUATION OF PROPERTY.

See APPEAL, II. 4—COMPANY, IV. 3—CONSTITUTIONAL LAW, 11—COURTS, IX. 6—CRIMINAL LAW, II. 12—MUNICIPAL CORPORATIONS, I. 1, 6—MUNICIPAL ELECTIONS, 11—SCHOOLS, 4.

### I. ASSESSMENT ROLL.

**Contestation — Prescription — Interruption — Injunction.]**—The contestation of a special assessment roll by a person named therein has not the effect of interrupting prescription as regards other persons subject to such assessment.—2. Even where the party contesting obtains a temporary order enjoining the city against making any collection under the roll attacked, prescription is not interrupted as regards other persons named in the assessment roll, where the making of such order is not objected to by the city, and where no steps are subsequently taken by the city to obtain its rescission. *City of Montreal v. Land and Loan Co.*, Q. R. 23 S. C. 461.

### II. CHARGE ON LAND.

**1. Cost of road-work — Personal liability of purchaser.]**—A municipal corporation has no right of action to recover the costs of road-work against the subsequent purchaser of the land assessed, but must first take judgment against the person liable for such work. *Township of Roston v. De Lorimier*, Q. R. 24 S. C. 57.

**2. School rates — Hypothec—Registration—Judgment — Sale — Interest — Costs—Prescription.]**—School rates constitute a privileged claim upon immovables (Art. 2009, 2011, C.C.), and are exempt from the formality of registration (Art. 2084, C.C.).—2. Where, under a specific provision of the law, a hypothec exists without registration, a judgment upon the debt does not need to be registered in order to preserve the hypothec, nor does sale purge the property therefrom.—3. The hypothec also covers interest and the costs of a personal judgment against the debtor, such interest and costs being

accessories of the debt (Art. 2017, C.C.).

—4. An action and judgment against the principal debtor interrupt the three years' prescription as against those who acquire the property from him. *Westmount School Commissioners v. Pitt*, Q. R. 24 S. C. 7.

**3. School rates—Hypothec—Registration—Personal liability of purchaser.]**—A person who acquires land after the imposition of a school assessment upon it, is not personally liable for the payment thereof, although the assessment is a special charge upon such property, bearing hypothec without registration. *Roseton School Commissioners v. De Lorimier*, Q. R. 24 S. C. 48.

### III. DISTRESS FOR TAXES.

**Warrant—Payment under constraint—Illegal arrest—Action for.]**—A warrant for taxes alleged to be due to the defendants was issued by the town treasurer and placed in the hands of a constable for collection. The constable went to the plaintiff's place of business to collect the amount, but, it being Saturday night, an arrangement was made between the constable and plaintiff that the latter would go up on Monday morning and see about the taxes. The plaintiff went to the treasurer's office and contended that the amount claimed in the warrant had been paid, but, as the treasurer insisted that the amount had not been paid, the plaintiff handed him the amount claimed.—It appeared that the amount in dispute was due in respect of a property which the plaintiff sold to Y., who agreed to pay the taxes upon it, and paid the same to the treasurer, intimating that it was paid on account of the plaintiff's property, but that the treasurer appropriated the amount in payment of a like amount due by Y. personally.—The plaintiff brought an action for illegal arrest, and claimed, as special damage, "amount wrongfully extorted from the plaintiff, as set forth in paragraph 4 of the pleading, \$8.25." Paragraph 4, referred to, detailed the issue of the warrant "whereby the plaintiff was unlawfully compelled to pay an illegal demand of the defendants, to wit, the sum of \$8.25."—*Held*, that, even on the plaintiff's own evidence, the action must fail. *Walker v. Town of Sydney*, 36 N. S. Reps. 48.

### IV. EXEMPTIONS.

**1. Canadian Pacific Railway lands—Twenty years' exemption—Grant from the Crown—Taxation by the Do-**

**minion—School taxes—Time of vesting of land granted.]**—The words "grant from the Crown" in clause 16 of the contract between the Government of Canada and the promoters of the Canadian Pacific Railway, ratified by Act of Parliament, 44 V. c. 1, mean the letters patent conveying the land, and the twenty years' exemption from taxation provided for in that clause do not begin to run, in respect of any particular parcel, till the date of the letters patent.—The words "taxation by the Dominion" in the same clause do not include taxation by school corporations created by the Government of the North-West Territories under powers of legislation conferred upon it by various Acts of Parliament prior to the statute referred to, and, consequently, the railway company are not exempted by said clause from taxation of their lands by such a school corporation until such lands shall be included in a Province hereafter to be created.—Under the contract referred to and the company's charter of incorporation and the ratifying Act, 44 V. c. 1, it was not intended that they should take any vested interest in any specific lands until actual formal conveyance from the Crown by letters patent in the usual course. *Rural Municipality of North Cypress v. Canadian Pacific R. W. Co.*, *Rural Municipality of Argyle v. Canadian Pacific R. W. Co.*, *School District of Springdale v. Canadian Pacific R. W. Co.*, 23 Occ. N. 159, 14 Man. L. R. 382.

**2. Personal property of military persons—Government building.]**—Under the provisions of the Halifax city charter, Acts of 1891, c. 53, s. 336, the following, among other property, is exempted from assessment: "All personal property of military persons residing in government buildings, or barracks," etc.—*Held*, that a private house in the city, under lease to His Majesty's Principal Secretary of State for the War Department, for the purpose of being used as a place of residence by a military person, for whom there was no suitable accommodation in any barracks in Halifax, was a "government building" within the meaning of the statute, and that personal property contained in such building was exempt from taxation for civic purposes. *Smith v. City of Halifax*, 35 N. S. Reps. 373.

### V. STATUTE LABOUR.

**Assessment Act—Imperative provision—Separate assessment of distinct lots.]**—Section 109 of the Assessment Act, which in effect provides that if the assessment is for more than 200 acres the statute labour shall be rated and charged against every separate lot or parcel

according to its assessed value, is imperative, and not merely directory. Where, therefore, on an assessment of 600 acres, instead of the amount chargeable against the several lots owned by the plaintiff being rated and charged against each lot, a bulk sum was assessed for statute labour and charged against the whole of them, the assessment was held invalid. *Love v. Webster*, 26 O. R. 453, followed. *Waechter v. Pinkerton*, 6 O. L. R. 241.

## VI. TAX SALE.

**1. Invalidity—Onus—Proof of taxes in arrear—Assessor's return—Irregularity—Limitation of actions.]**—In an action brought on the 23rd April, 1902, to set aside a sale of land made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in November, 1899:—*Held*, that the onus of proof of the invalidity of the tax title rested on the plaintiffs.—Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by s. 152 of the Assessment Act, R. S. O. 1897 c. 224, liable to be sold in 1898 for such arrears.—The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do by the last clause of s. 153, with a true copy of the list furnished by the latter under s. 152, with the assessor's return, certified to by the clerk under the seal of the corporation.—*Quære*, whether this requirement of s. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation.—*Love v. Webster*, 26 O. R. 453, distinguished:—*Held*, however, that as in this case the omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and as the action was brought more than three years after the sale and more than two years after the deed, it should be dismissed. *Kennan v. Turner*, 23 Occ. N. 195, 5 O. L. R. 560.

**2. Sale by provincial assessor—Property of municipality—Purchaser—Agent—Fiduciary relationship.]**—The city of Nelson was incorporated in March, 1897, and in September, 1898, land situated therein was sold by the provincial assessor for taxes for the years 1896 and 1897, levied under the provisions of the

**Assessment Act:—***Held*, setting aside the tax deed, that there was no authority to hold the tax sale, as the Assessment Act does not apply to municipalities. — In July, 1897, a real estate agent on behalf of the owner negotiated with a prospective purchaser, but the attempted sale fell through, and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—*Held*, that at the time of the sale the agent was not in a fiduciary relation to the owner. *McLeod v. Waterman*, 10 Brit. Col. L. R. 42.

## VII. VALUATION OF PROPERTY.

**1. Improvements—Selling value.]**—The measure of value of improvements for purposes of taxation prescribed by s. 38 of the Vancouver Incorporation Act, 1900, is the actual cash selling value, and not the cost. *In re Municipal Clauses Act and J. O. Dunsmuir*, 8 Brit. Col. L. R. 361, followed. *In re Vancouver Incorporation Act, 1900, and B. T. Rogers*, 9 Brit. Col. L. R. 373, not followed. *In re Vancouver Incorporation Act, 1900, and B. T. Rogers*, 9 Brit. Col. L. R. 495.

**2. Property of electric companies—"Substructures and superstructures"—"Rolling stock, plant, and appliances"—Construction of statute—Ejusdem generis rule.]**—*Held*, that 2 Edw. VII. c. 31, s. 1, s.s. 4 (O.), substituting a new s. 18 in the Assessment Act, and providing that "save as aforesaid, rolling stock, plant, and appliances mentioned in s.s. (2) hereof, shall not be land within the meaning of the Assessment Act, and shall not be assessable," does not exempt the appellant companies from assessment in respect of their plant and appliances (though otherwise land within the meaning of s.s. 9 of s. 2 of the Assessment Act), which is not upon the streets, roads, highways, etc., as mentioned in s.s. 3 of that section.—The object of s.s. 4 is to make it clear that rolling stock, etc., of the railway companies which is found and used in the streets, shall not, save as mentioned in s.s. 3, be, by reason merely of the wide words "substructures and superstructures" used in s.s. 3, be liable to taxation as land. The words "plant and appliances," following the specific term "rolling stock," are to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant, and appliances such as tools in connection with or belonging to such stock; and the reference is to "rolling stock, plant, and appliances" of such companies mentioned in s.s. 2 as

have such rolling stock. *In re City of Toronto Assessment Appeals, In re City of Ottawa Assessment Appeals*, 23 Occ. N. 258, 6 O. L. R. 187.

**3. Valuation roll**—*Petition to set aside—Parties—Interest.*]—Valuators must proceed strictly according to law, and it cannot be said, in answer to a petition to set aside a valuation roll, that they have acted in the exercise of their discretion or according to an established practice.—2. It cannot be alleged that the party who contests a valuation roll is acting in the interest of other persons, unless it is also alleged that the petitioner himself is without any interest whatever. *Leitch v. Town of Westmount*, 5 Q. P. R. 225.

**4. Vancouver Incorporation Act, 1900, ss. 38, 56**—*Valuation of improvements—Mode of—Decision of Judge on appeal from Court of Revision—Appeal from.*]—No appeal lies from the decision of a Judge on an appeal from the Court of Revision, had under s. 56 of the Vancouver Incorporation Act.—An objection to an appeal on the ground that the Court has no jurisdiction to hear it is not a preliminary objection within s. 83 of the Supreme Court Act.—Although the full Court has no jurisdiction to hear an appeal, it has jurisdiction to award costs in dismissing it.—Under s. 38 of the Vancouver Incorporation Act, 1900, all ratable property for assessment purposes shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor.—In estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive. *In re Vancouver Incorporation Act and Rogers*, 23 Occ. N. 72, 9 Brit. Col. L. R. 373.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY, III.

## ATTACHMENT OF DEBTS.

I. GENERALLY—WHAT DEBTS ATTACHABLE.

II. PRACTICE AND PROCEDURE IN GARNISHMENT.

See CHOSE IN ACTION, ASSIGNMENT OF, 2—COSTS, VI. 2, 3, 4—COURTS, V. 1—EXECUTION, II. 9—EXECUTORS AND ADMINISTRATORS, 1, 7.

## I. GENERALLY—WHAT DEBTS ATTACHABLE.

**1. Alimentary allowance—Claim for maintenance of natural child—Ancestors.**]—The obligation resulting from a natural relationship does not extend to the ancestors of the father and mother of the natural child. **2. Alimentary debts,** for the payment of which an income bequeathed for alimentary purposes may be attached, are such as are due to a creditor who has furnished aliments to the person entitled to the allowance and his family, and not those which such person may be under an obligation to furnish for his natural child. *McAulay v. McLennan*, Q. R. 23 S. C. 419.

**2. Damages for personal injuries—Alimentary claim—Limited attachment.**]—Damages awarded as compensation for personal wrongs, bodily injuries, and medical attendance rendered necessary thereby, are in the nature of an alimentary claim, and are not attachable for a debt other than one which has been created for the purpose of assuring the payment of such damages or the preservation of the plaintiff's right thereto. *Lafond v. Marsan*, Q. R. 24 S. C. 22, 5 Q. P. R. 326.

**3. Interest of debtor under will—Residuary legatee.**]—A primary creditor in a Division Court, by garnishee summons served on the executors, attached the interest of the primary debtor, as residuary legatee, in the estate of a testator who had died within a year of the attachment. A receiver was subsequently in a High Court action appointed to receive his interest.—The Judge in the Division Court gave judgment against the garnishee, and an application for a new trial by the garnishee, on the ground that such interest was not attachable, was dismissed, but on an appeal to a Divisional Court:—*Held*, that the residuary legatee's interest was not such a debt as could be attached; and the garnishees were discharged. *Hunaberry v. Kratz*, 23 Occ. N. 185, 5 O. L. R. 635.

**4. Legacy—Alimentary allowance—Precious alimentary debt.**]—Sums bequeathed by will as aliments, with a proviso that they are to be insaisissable, cannot be garnished for an alimentary debt arising prior to the will. *Kelly v. Mason*, Q. R. 23 S. C. 97.

**5. Life rent—Reservation by donor of immovables.**]—A life rent reserved by the donor of immovable property, in his own favour, and secured by hypothec, does not fall under the provisions of Art. 509 (4). C. P.; and is not exempt from seizure by creditors of the donor. *Bradford v. Lasnier*, Q. R. 24 S. C. 53.

**6. Purchase money of land—Issue between judgment creditor and claimant—Scope of—Fraudulent conveyance—Husband and wife.]**—An issue was directed to try the question whether certain moneys in the hands of a garnishee were, at the time of the service of the garnishee summons, the moneys of the plaintiff in the issue, as a creditor of the judgment debtor, as against the defendant in the issue, the wife of the debtor.—The moneys were the balance of the purchase price of land sold by the judgment debtor's wife to the garnishee:—*Held, per ROULEAU, J.*, the trial Judge, 13 Occ. N. 472, that the Court on such an issue could not inquire into the question whether the land, having formerly been that of the judgment debtor, had been fraudulently conveyed to his wife.—On appeal to the Court in banc:—*Held*, reversing the judgment of ROULEAU, J., who adhered to his former opinion, that the Court could so inquire. *Hull v. Donohoe*, 2 Terr. L. R. 52. Reversed and judgment of ROULEAU J., restored, 24 S. C. R. 683, 15 Occ. N. 366.

**7. Rent—To whom due—Heirs of deceased landlord—Executors—Devolution of Estates Act.]**—Five plaintiffs, claiming as heirs-at-law of their father to be owners of a lot of land, brought an action for specific performance, which was dismissed with costs, subsequently taxed at \$209.49. After the trial one of the plaintiffs, G. R., died, and probate of his will was granted to a sister and co-plaintiff, M. S., and the action was revived in the names of the remaining plaintiffs and M. S. as his executrix, and an appeal against the judgment was also dismissed with costs.—It appeared that G. R. owned one-half of the lot, and the father the other half, and that the lot had been leased to a tenant by M. O'R., one of the plaintiffs, as administratrix of the estate of the father, who died in or before 1896, and M. S., as administratrix of the estate of G. R. No caution was registered under the Devolution of Estates Act:—*Held*, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs.—*Macoulay v. Rumball*, 10 C. P. 284, commented on. *McDonald v. Sullivan*, 23 Occ. N. 45, 5 O. L. R. 87.

## II. PRACTICE AND PROCEDURE IN GARNISHMENT.

**1. Declaration of garnishee—Conditional debt—Discharge.]**—If a garnishee declares that he owes nothing to the judgment debtor, but that there is a contract between them under which the judgment debtor is allowed to take insurance risks for the company of which the garnishee is an agent, the judgment debtor and the garnishee are not entitled

upon such declaration to have the attachment proceedings dismissed, as they would be if the garnishee had declared simply that he owed nothing. *Quere*, is there ground, in the case of a conditional debt, to claim dismissal of the proceedings on the ground that the garnishing creditor has not had it declared that the attachment is binding. *Lamothe v. Piche*, 5 Q. P. R. 180.

**2. Declaration of garnishee—Default of—Judgment—Appeal—Relief on terms.]**—A garnishee who has appealed from a judgment against him by default, and whose appeal has been dismissed, may still be relieved from his default to make a declaration upon paying all the costs incurred, including those of the appeal. *Saunders v. Boeckh*, 5 Q. P. R. 416.

**3. Declaration of garnishee—Judgment—Moneys accruing due—New declaration.]**—In order that an attachment after judgment in the hands of a third party be binding, it must be so declared by judgment; in the absence of a contestation of the garnishee's declaration within the legal delays, and of a demand within the same delay to have the seizure declared binding, a writ of attachment is without effect against the garnishee as regards the sums which may eventually become due; and a motion then made to make him declare *de novo* will be rejected. *Decelles v. Lafleur*, 5 Q. P. R. 439.

**4. Declaration of garnishee—Judgment—Reduction on appeal—Payment of solicitor's costs—Set-off.]**—A garnishee, who has declared that he was adjudged to pay to the defendant \$100 damages by a judgment from which he has appealed, cannot afterwards, after the amount of the judgment has been reduced by the Court in review to \$50, with costs of the hearing and review against the defendant, allege by a subsequent declaration that he has paid his solicitor the \$50 allowed to him by the later judgment, which had been garnished before the decision. *Pieffer v. Campeau*, 5 Q. P. R. 185.

**5. Declaration of garnishee—Time for contesting—Dismissal of attachment proceedings—Separate orders in favour of judgment debtor and garnishee—Inscription in review—Deposit—Desistment.]**—In a summary cause the time for contesting the declaration of a garnishee is two days. 2. A plaintiff who complains of judgments dismissing his proceedings against the defendant and the garnishee, upon two separate motions, must make separate inscriptions in review in respect of each judgment and make a deposit in each case, in default of which his inscription will be set aside. 3. Where an in-

scription in review has been set aside, the Court of Review has no jurisdiction to adjudicate upon the validity of a desistment from the judgment: that must be dealt with by the Court of first instance. *Lamothe v. Piche*, 5 Q. P. R. 164.

**6. Default of service on debtor—***Motion to dismiss.*]—A debtor who has not been served with attachment process after judgment cannot appear and demand dismissal of the attachment. *Fafard v. Marsan*, 5 Q. P. R. 438.

**7. Desistment — Notice — Withdrawal—Costs.**]—Where a garnishing creditor desists from the attachment proceedings without mentioning that the attachment was made with costs, and without giving notice of such desistment to the attorneys of the garnishee, a motion by the latter for withdrawal of the attachment will be granted with costs. *Levy v. Arkbulatoff*, 5 Q. P. R. 338.

**8. Petition to quash saisie-arret before judgment—Judgment debtor—Parties—Conclusions.**]—A creditor cannot, by means of a *saisie-arret* before judgment, restrain the *tiers-saisi* from paying certain sums to his debtor, made a party to the proceeding as *mis-en-cause*, but against whom no conclusions are taken. 2. A petition to quash the *saisie-arret* on the part of the *mis-en-cause* is the proper proceeding in such a case. *Duckett v. Bayard*, 5 Q. P. R. 281.

**9. Requisites of saisie-arret after judgment—Salary—Declaration of garnishee — Costs.**]—If a writ of attachment after judgment does not state the nature and place of the debtor's occupation, it does not constitute a seizure of salary which can be declared *tenante*, and a motion to that effect will be dismissed. — 2. However, if the garnishee by his declaration has set forth the fact that the defendant was in his employ on salary, a motion to have seizure declared binding will be dismissed without costs, as the seizing creditor had some reason to believe that the seizure was recognized as one of salary. *Drouin v. Brunelle*, 5 Q. P. R. 371.

**10. Service of saisie-arret—Domicil of judgment debtor—Death—Garnishable debt—Proceeds of sheriff's sale—Subsequent re-sale.**]—Article 135 of the Code of Procedure, which authorizes service upon the heirs of a person deceased within the previous six months, at the former domicil of deceased, applies to proceedings against the heirs, and not to the service of a *saisie-arret* issued against the deceased himself, on a judgment obtained against him, the fact of his death, at the time of the service of the *saisie-arret*, being known to the plaintiff.—2. A collo-

cation founded on the first sale of an immovable by the sheriff ceases to have effect when the same immovable is resold at *folle-enchère*, and a *saisie-arret* in the hands of the sheriff for the amount of such first collocation cannot be maintained. *Demers v. Gaudet*, Q. R. 23 S. C. 276.

**11. Service of saisie-arret—Effect of—Payment to debtor after service—Payment again to creditor—Declaration—Contestation.**]—It is the service of the writ of *saisie-arret* which establishes the claim of the garnisher against the garnishee. 2. From the moment of the regular service of the *saisie-arret*, the garnishee is prevented from paying to the judgment debtor, and, if he does so, will be obliged to pay a second time, whether he knew or not of the service being made; that is the consequence of the change made by Art. 679 of the new Code of Procedure in Art. 615 of the old. 3. When a garnishee commences his declaration by denying that he owes anything to the judgment debtor, and afterwards it is clearly established that he did owe him and had paid him after the service of the *saisie-arret*, it is not necessary to contest his declaration; the Court will order the garnishee to pay again. *Montambault v. Lapointe*, Q. R. 23 S. C. 413.

## ATTACHMENT OF GOODS.

**Attachment before judgment—Affidavit—Sufficiency.**]—The following statement in an affidavit: "That the said (defendant) said and declared to this deponent that he was going to sell everything and decamp from the country in order not to pay him (deponent); and the said deponent is, besides, credibly informed and believes that the said (defendant) is concealing and selling and is about to conceal and sell his property with the intention of defrauding his creditors, and particularly the said deponent, and the sources of my information are that one B., a milkman, affirms that the said (defendant) said and declared to him that he would sell all his property in order not to pay the deponent his said debt." — *Held*, sufficient; and that a *saisie-arret* before judgment containing this allegation should not be quashed upon petition. *Lefebvre v. Rochon*, 5 Q. P. R. 443.

See LIEN, 4—SALE OF GOODS, VI. 3.

## ATTORNEY.

See COSTS. I. 1—PEREMPTION. 4. 5—SOLICITOR—WRIT OF SUMMONS, I. 1.

**ATTORNEY-GENERAL.**

See CONSTITUTIONAL LAW, 11—MUNICIPAL CORPORATIONS, XIV. 2, XVI. 8—WILL, I. 1.

**AUCTION.**

See VENDOR AND PURCHASER, 6.

**AUCTIONEER.**

See PRINCIPAL AND AGENT.

**AUDIT.**

See COMPANY IV. 5.

**AWARD.**

See ARBITRATION AND AWARD.

**BAIL.**

See ARREST, I., II., III. 6—COURTS, III. CRIMINAL LAW, III. 1.

**BAILIFF.**

See EXECUTION—MALICIOUS PROSECUTION, 3—NOTICE OF ACTION, 1—WRIT OF SUMMONS, I, 7, 8.

**BANKRUPTCY AND INSOLVENCY.**

I. ABANDONMENT BY INSOLVENT.

II. ACT OF INSOLVENCY.

III. ASSIGNMENT FOR BENEFIT OF CREDITORS.

IV. COMPOSITION.

V. PREFERENCE.

See APPEAL, X. 5—BILLS OF EXCHANGE AND PROMISSORY NOTES, 7, 16, 18, 19—COMPANY, III.—COURTS, V. 2—EXECUTION, II. 1—FRAUDULENT CONVEYANCE, 2, 3—JUDGMENT, II. 7—PRINCIPAL AND AGENT, 6—SALE OF GOODS, VI. 3—VENDOR AND PURCHASER, 1.

I. ABANDONMENT BY INSOLVENT.

**1. Contestation of schedule — Fraud—Pleading.]**—Where an insolvent's

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schedule is contested for fraud, and the insolvent in his reply to the contestation explains his acts in order to justify them, the contestant will be allowed to rejoin to this reply alleged facts connected with the allegations of his contestation in order to explain and justify them, and these allegations will not be struck out on the ground that they should have formed part of the contestation itself. *Bessette v. Ball*, 5 Q. P. R. 233.

**2. Contestation of schedule — Summary procedure—Inscription—Notice—Filing—Service—Time.]**—The rules and times for taking the different steps in the matter of the contestation of a schedule are those applicable to summary procedure. 2. An inscription on the merits in every case must first be filed at the office of the Court, and notice must afterwards be given to the opposite party. 3. In a summary matter an inscription upon the merits filed less than three clear days before that fixed for the hearing is illegal and will be set aside upon motion, even when the notice of inscription has been given to the opposite party three days before that fixed for the hearing, such notice being irregular because the inscription had not been filed at the office of the Court at the time that it was served. *Dufour v. Ames-Holden Co.*, 6 Q. P. R. 38.

**3. Creditors' claims—Communication to other creditors.]**—The curator to an abandonment of property is bound to communicate to creditors information concerning the claims filed by other creditors, and documents accompanying these claims. *Williamson v. Stevenson*, 5 Q. P. R. 407.

**4. Creditors' claims—Contestation—Filing—Subrogation—Exception to form—Tierce-opposition.]**—The original of a contestation of claim must be filed with the curator, and it is not enough to file a copy. 2. An allegation in such a contestation that the contestant has been subrogated to different creditors of the insolvent cannot be attacked by exception to the form upon the allegation that it is not supported by documents justifying it. 3. The fact that certain grounds of contestation of a claim really amount to a *tierce-opposition*, while the contestant is not in a position to claim as a *tiers-oppo-*sant, is also a ground of substance which cannot be discussed upon an exception to the form. *Beaudoin v. Lamothe*, 5 Q. P. R. 356.

**5. Creditors' claims—Filing with prothonotary—Fee.]**—By virtue of Art. 44 of the tariff of prothonotaries, a prothonotary has a right to charge a fee upon a claim sworn to and filed with

him, for the purpose of authorizing the creditor filing it to vote at a meeting held for the nomination of a curator, etc., pursuant to Art. 867, C. P. *In re Beaudoin*, Q. R. 23 S. C. 179, 5 Q. P. R. 291.

**6. Creditors' claims—Contestation by curator—Defect in service—Curing by letter—Subsequent order.]**—A letter written by the advocate of the curator to a creditor whose claim is contested, upon whom the contestation has not been served, informing him that such a contestation has been filed, and that he must attend to it or otherwise judgment will be given against him, cannot cure a defect in service of the contestation, especially when there is no proof that the letter reached the creditor. 2. The service upon a creditor whose claim is contested, who has not appeared and who is not represented by an advocate, of an order to answer *sur faits et articles*, to which order he does not appear, cannot cure a defect in service of the contestation. *In re Moisan*, Q. R. 22 S. C. 423.

**7. Creditors' claims—Contestation by curator—Order pour faits et articles—Default of appearance—Waiver—Adjournment—Signature of advocate.]**—An order *pour faits et articles* was returned on the 6th May. The creditor whose claim was contested made default. He did not appear by attorney. Indorsed on the order were these words: "By consent, continued to 7th instant. 6th May, 1901. F. P. T. R. & C., attorneys for contestant. P. Cantin." The Court takes judicial notice of the signature of advocates; therefore, it is informed that "P. Cantin" is the signature of an advocate. But that advocate not having appeared for the creditor whose claim was contested, there was nothing to shew that he had signed for the creditor or as being authorized by him:—*Held*, therefore, that the curator could not infer from the fact that the signature "P. Cantin" was there, an acquiescence by the creditor in the proceedings of the curator, or an act curing the default of service of the contestation. *In re Moisan*, Q. R. 22 S. C. 423.

**8. Creditors' claims—Contestation by curator—Second dividend sheet—Contestation—Petition to set aside judgment—*Lis pendens*.]**—The curator prepared a second dividend sheet collocating the creditors for 17 per cent. In consequence of a judgment by default against a creditor, V., setting aside the collocation which the first dividend sheet had awarded, the curator completely omitted to collocate this creditor in his second sheet. At that time the creditor was not aware of the judgment upon his collocation on the first sheet. He thereupon contested the second sheet, demanding to be collocated upon it.

Afterwards he became aware of the judgment upon the first sheet, and he thereupon presented a petition against that judgment:—*Held*, that there was no *lis pendens* by the contestation of the second dividend sheet; that the petition and the contestation of the second sheet were two distinct proceedings. *In re Moisan*, Q. R. 22 S. C. 423.

**9. Creditors' claims—Contestation by curator—Service—Judgment by default—Void service—Petition to set aside.]**—The curator to an abandonment, having made and issued a first dividend sheet in which a creditor, V., was, with other creditors, collocated for 15 per cent., and having afterwards, with the necessary authorization, contested the collocation and the claim of V., must transmit this contestation to the prothonotary at once, and the contestation must be served on the creditor. 2. Such contestation not having been served, a judgment by default against the creditor maintaining the contestation will be rescinded upon petition. 3. The petition, although intitled "petition for review," if it contains all the material necessary for an ordinary petition, will be considered as such. 4. The enumeration in Art. 1177, C. P., of the cases in which a petition may be presented, is not limitative. 5. If, in place of serving upon the creditor collocated a copy of the contestation, the bailiff, by mistake, serves upon him a copy of the contestation of collocation of another creditor, it is the same as if he had not been served at all. 6. Upon motion for leave to contest the report of service by the bailiff, a Judge will order *prover avant faire droit*; and upon proof of the falsity of such report, it will be set aside. *In re Moisan*, Q. R. 22 S. C. 423.

**10. Creditors' claims—Delay in filing—Distribution.]**—A creditor who has not filed a claim with the curator to an abandonment of property, is not on that ground deprived of the right of resorting to the proceeds of the sale of the insolvent's goods for payment, but, if there still remain moneys to be distributed, he may demand payment of his claim in preference to other creditors to an amount in proportion to that which has been paid to them, and to be collocated at so much on the dollar with the other creditors for what remains due. *In re Brais*, Q. R. 22 S. C. 470.

**11. Curator of insolvent estate—Payments to privileged creditors—Collocation—Formalities.]**—The curator of an insolvent estate ought not to pay money received from the proceeds of the property of the insolvent, even to a privileged creditor, before all the formalities required by Art. 880, C. P., for the preparation of the memorandum of collocation.



tion have been observed. 2. The Court or a Judge should not as a general rule order the curator, although he is subject to the Court's summary jurisdiction, to depart from this Art. 890, C. P. *In re Smith and Gagnon*, Q. R. 22 S. C. 372.

**12. Declaration of insolvent—Place of filing—Domicil—Nullity.**—To constitute a valid abandonment of property, the declaration and statement of the debtor must be filed in the office of the Superior Court for the district in which the debtor has his principal place of business or his domicil.—2. If the declaration and statement are filed in any other district than the above, the abandonment is illegal, and all proceedings therein are null and void. *In re Rivard*, Q. R. 22 S. C. 190.

**13. Demand of abandonment—Contestation—Petition—Deposit—Practice—Hearing.**—The contestation of a demand of abandonment is not governed by the rules governing pleadings, but is made by summary petition, which need not be accompanied by a deposit, even if it questions the jurisdiction of the Court in the office of which the demand is filed.—2. If a debtor, by his petition, urges that a delay was granted to him by the creditor demanding abandonment, the adjudication on his petition, and on a motion to reject the same, will be deferred until after proof is made by both parties of their respective allegations. *Mussen v. Fillion*, 5 O. P. R. 170.

**14. Demand—Retired trader—Refusal to assign—Arrest—Capias.**—It is not necessary that a person be actually engaged in trade when a demand of abandonment is made upon him. Even where he has ceased for several years to carry on trade, he is nevertheless subject to a demand of abandonment based on a commercial debt contracted by himself or his firm while he was engaged in trade; and consequently, in such case, under Art. 895, C. C. P., he is liable to arrest under *capias* for refusal to make an abandonment. *Carter v. McCarthy*, Q. R. 6 Q. B. 499, followed, and *Roy v. Ellis*, Q. R. 7 Q. B. 222, distinguished. *Perkins v. Perkins*, Q. R. 22 S. C. 72.

**15. Execution against lands of insolvent—Sale—Curator.**—After an abandonment of property of a debtor for the benefit of his creditors, one of the creditors cannot, in execution of a judgment obtained against the debtor, cause to be seized and sold, without the consent of the curator, of the other creditors, or of the Court, the immovable property of the debtor, but the seizure and sale of the immovables must be made at the instance of the curator. *Birks v. Lewis*,

Q. R. 8 Q. B. 517, discussed. *Demers v. Gagnon*, Q. R. 11 K. B. 498.

**16. Landlord's claims for rent—Statutory restriction—Retroactivity—Interest—Expenses of administration of estate.**—A right which has been acquired under an existing law cannot be affected by a law subsequently enacted, unless it has been expressly declared by the Legislature that it shall have a retroactive effect.—2. The amendment made by 61 V. c. 46 (replacing Art. 2005 of the Civil Code), by which, in the case of the liquidation of property abandoned by an insolvent trader, the lessor's privilege is restricted to twelve months' rent due, and to rent to become due during the current year, etc., in the absence of any provision making the statute retroactive, does not apply to or include claims for rent due under authentic leases made previous to the coming into force of the amending Act.—3. Where it appears, on the one hand, that an amount of interest has accrued during the winding-up of an insolvent estate, on moneys deposited in banks, representing the *gage* of particular creditors, but, on the other hand, that the expenses of administration of the estate have exceeded such sum, the creditors have no right to claim such interest.—Judgment in Q. R. 22 S. C. 46 reversed. *In re Bulmer, Beaudry v. Ross*, Q. R. 12 K. B. 334.

**17. Provisional guardian—Change of.**—The fact that a provisional guardian, appointed by the prothonotary, is a creditor for a sum less than the claim of another creditor is not a sufficient cause for the Court to substitute the other creditor for him. 2. The Court will not order a change of provisional guardian except upon proof of incompetence or dishonesty. *In re Bonhomme*, Q. R. 22 S. C. 22.

**18. Purchase of estate by wife of insolvent—Agreement with creditor.**—An agreement by the wife, separated as to property, of an insolvent trader, to pay one of his creditors \$100, and also to compensate any loss he might sustain by the insolvency, in consideration of his assistance in financing the purchase by her of her husband's bankrupt estate, does not come within the prohibition contained in Art. 1301, C. C., where such purchase was carried out, and the wife continued the business in her own name. *Carter v. Walker*, Q. R. 23 S. C. 123.

**19. Trader—Compulsory abandonment.**—A trader who neglects to pay at maturity the claims of two of his creditors, which compose more than half of his debts, will be ordered to make an abandonment of his property. *Lemay v. Parizeau*, 6 Q. P. R. 40.

## II. ACT OF INSOLVENCY.

**Second hypothec—Vente à réméré—Impairment of first security.]**—A debtor having on the 8th May, 1901, executed an instrument hypothecating his immovables for an advance payable at the end of three years, subsequently, in order to defray the costs of an action, the existence of which his creditor knew at the time of the loan, and which was afterwards decided against him, borrowed from another person the amount necessary to pay these costs, and gave to this new creditor a *vente à réméré* upon the immovables already hypothecated. He was sued by his first creditor upon the hypothec not yet due, and for a declaration that he was insolvent and had impaired the security which he had given:—*Held*, that, in executing the *vente à réméré*, he had not made himself insolvent, that he had done no injury to the security which he had given to his first creditor, and that what he did did not come within the provisions of Art. 1092, C. C. *Danjou v. Vailancourt*, Q. R. 22 S. C. 316.

## III. ASSIGNMENT FOR BENEFIT OF CREDITORS.

**1. Declaration of right to rank—Division Court.]**—An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R. S. O. 1897 c. 147, is not within the jurisdiction of a Division Court. *In re Bergman v. Armstrong*, 23 Occ. N. 14, 4 O. L. R. 717.

**2. Preferential claim—Wages of assignor—Creditors' Trust Deeds Act—Contractor.]**—The plaintiff contracted with cannery proprietors (a) to supply labour and pack salmon at a stated price per case, i.e., by piece work; and (b) to act as foreman of the labourers supplied by him, at a salary of \$50 per month.—The proprietors having assigned for the benefit of creditors, the plaintiff sought to enforce the preference given by s. 36 of the Creditors' Trust Deeds Act in respect to both the salary and the piece work:—*Held*, that the preference must be restricted to the salary. *Ah Tam v. Robertson*, 23 Occ. N. 238, 9 Brit. Col. L. R. 505.

See COSTS, VII. 3.

## IV. COMPOSITION.

**Setting aside—Misstatement.]**—A composition arrangement made with a creditor induced by a misstatement by the

debtor to the creditor of the amount of assets and liabilities, will be set aside if repudiated on the discovery of the falsity of the statement, and before any benefit has been taken under the arrangement, even though the misstatement be not shewn to have been fraudulently made.—*Derry v. Peek*, 14 App. Cas. 337, applied. *Indian Head Wine and Liquor Co. v. Skinner*, 23 Occ. N. 73; *Plisson v. Skinner*, 5 Terr. L. R. 391.

## V. PREFERENCE.

**1. Bill of sale—Levy by sheriff—“Action or proceeding”—Pressure—Presumption.]**—In an action against a sheriff for the conversion of goods levied upon by him under executions issued on judgments recovered against R., the plaintiffs' title to the goods depended upon a bill of sale from R.—The evidence shewing that R. was an insolvent, and the effect of the giving of the bill of sale being to give the plaintiffs a preference over the other creditors of R., and the levy made by the defendant having been made within sixty days from the giving of the bill of sale:—*Held*, that the levy was “an action or proceeding” had or taken to set aside the transfer, within the meaning of R. S. N. S. 1900 c. 145, s. 4, and that, under the provisions of s.-s. (2), the bill of sale must be presumed to have been made with intent to give an unjust preference, and to be such preference, whether made voluntarily or under pressure, and that, as against the creditors represented by the defendant, it was utterly void. *Shediak Boot and Shoe Co. v. Buchanan*, 35 N. S. Reps. 511.

**2. Bill of sale—Pressure—Authority of partner.]**—A firm composed of three members being insolvent and being indebted to the plaintiffs and also to the defendants, one of the members of the firm, under a threat of an action by the defendants, executed a bill of sale of all firm's assets under which the defendants immediately took possession:—*Held*, that the bill of sale was not a fraudulent preference, but was given *bona fide* under pressure, and that the member of the firm who executed it had implied authority to do so, or his partners had ratified his act or were estopped from denying his authority. *McClary Mfg. Co. v. Howland*, 9 Brit. Col. L. R. 479.

**3. Knowledge of insolvency—Pressure.]**—The judgment in *S Brit. Col. L. R. 314* affirmed. *Adams v. Bank of Montreal*, 32 S. C. R. 719.

See *ante* III. 2.

See FRAUDULENT CONVEYANCE.

## BANKS AND BANKING.

**1. Bill of lading—Draft attached—Examination of goods—Surrender of bill—Conversion—Pleading—Amendment—Costs—Measure of damages.]**—The judgment in 4 Terr. L. R. 498 affirmed on the merits with a variation in form and as to costs:—*Held*, by the majority of the Court, that had the consignees, as in *Shepherd v. Harrison*, L. R. 5 H. L. 116, sent the bill of exchange, with the bill of lading attached, directly to the defendant, they might have sued for the price on the basis of the defendant's acceptance of the goods, or for damages on the basis of a conversion. In the former case the defendant could have set up the defective quality of the goods in diminution of the price. In the latter case the measure of damages would have been the value of the goods to the consignors, which would probably be the same as in the former case. The bank, as the holders of the bill of lading, were in no better position than the consignors. *Imperial Bank v. Hull*, 5 Terr. L. R. 313.

**2. Discount of notes—Excessive rates of interest—Payment by cheques on overdrawn account, afterwards met.]**—The plaintiffs, a banking corporation subject to the provisions of the Bank Act, discounted notes made by the defendant, one of their customers, and also allowed him to overdraw his current account. The notes were payable on demand, and purported to bear interest at 20 per cent. per annum. The defendant also agreed to pay interest at that rate on his overdraft; afterwards the rate was reduced to 18 per cent. The defendant from time to time gave the plaintiffs cheques to pay interest accrued; when the cheques were given, the accounts they were drawn against had already been overdrawn. But each account was at some date after the giving and charging up of such cheques on it changed into a credit balance in the defendant's favour by deposits or by collections made by the plaintiffs for the defendant's account. Those cheques covered such interest up to the 31st January, 1902.—The plaintiffs credited themselves with interest at 24 and 18 per cent. up to 31st January, 1902, and alleged that it was paid them by the above cheques:—*Held*, that judgment should be entered for the plaintiffs, with a reference to the Master to take the accounts. The defendant did not recall the cheques or stop payment of them. They were given to the plaintiffs as creditors of the defendant, and not as his bankers. They were in effect directions to the plaintiffs as the defendant's bankers to pay the amounts to themselves as creditors as soon as there should be available funds at his credit with them, as his bankers, to pay them with, and

they were in fact paid out of such funds when available; and the defendant could not recover the excess over seven per cent.—From the 31st January, 1902, the plaintiffs could charge the defendant with interest at the rate of five per cent. only, that being the legal rate. *Bank of British North America v. Bossuyt*, 23 Occ. N. 338.

**3. Taking security for past debt—Transfer of goods—Agreement—Title—Purchaser—Execution against debtor.]**—B., being indebted to a bank, gave them a document purporting to be a warehouse receipt, and also a general transfer or bill of sale. The bank took possession of a portion of the goods covered by the documents and removed them, and was proceeding with the removal of others of the goods, when the removal was forbidden by one of B.'s clerks.—Two actions of replevin, brought by the bank to recover possession of the remainder of the goods, were compromised by B., who agreed that the bank should take the goods and sell them, and credit him with the amount received:—*Held*, that, notwithstanding any irregularities under the Banking Act, the title of the bank was complete under the compromise made between the bank and B., and that the plaintiff, who purchased a portion of the goods from the bank, was entitled to recover against the defendant sheriff, who levied on the goods under an execution against B.:—*Held*, also, assuming it to be correct that the security on the goods held by the bank was void under the provisions of the Act, not being for a present advance, but for a past due debt, and that the bank were not entitled to hold such security against the creditors of B., that the bank were not obliged to rest their title on the document, and that its defects, if any, would not affect the subsequent transaction by which the bank became the actual purchasers of the goods and dealt with them as their property. *Armstrong v. Buchanan*, 35 N. S. Reps. 559.

**4. Winding-up of bank—Liquidator—Action on promissory note—Amendment—Intervention—Costs.]**—The liquidator of a bank in liquidation has no status to sue one of the debtors of the bank upon a promissory note which fell due before the winding-up order, but the action must be brought in the name of the bank.—2. The liquidator cannot, by way of amendment, add the bank as a party in an action which he has begun in his own name.—3. An intervention is not a separate and distinct demand, but is grafted upon the principal action, and must fall with it when that action is void *ab initio*.—4. In this case the intervention having been useless because founded upon grounds already set up by the plain-

tiff, the Superior Court was right in dismissing it with costs. Judgment in Q. R. 19 S. C. affirmed. *Kent v. Bastien*, Q. R. 12 K. B. 120.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 8, 9—COMPANY, III. 5—DEED, 3—NEGLIGENCE, 8—TENDER.

### BASTARD.

See ATTACHMENT OF DEBTS, I. 1—DISTRIBUTION OF ESTATES, 5—INFANT, 2.

### BAWDY HOUSE.

See LANDLORD AND TENANT, III. 14.

### BENEFIT SOCIETY.

**Rules—Construction—Participation of member in benefits.]**—The 12th rule or by-law of the relief society established in connection with the mines of the Dominion Coal Co., provided that "no member shall participate in the benefits of the society until two full months after the date of his first payment."—*Held*, that a member was absolutely excluded from any participation in the benefits of the society in case of illness or accident happening within the period of two months, and that the right to participate only began in cases where the inability to work was due to causes arising after the lapse of the two months. *McDonald v. Dominion Coal Co.'s Relief Fund*, 36 N. S. Repts. 15.

See INSURANCE, III. 2, 3.

### BIGAMY.

See CRIMINAL LAW, II. 2.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

**1. Accommodation indorser—Action for indemnity against maker—Condition precedent—Notice of dishonour.]**—The obligation of the indorser of a promissory note is a conditional obligation, the condition being that the note shall be protested and that notice of protest shall be given to him. Therefore, he has no right of action against the maker for indemnity in respect of his obligation, even after the note has fallen due, if it has not been protested and

notice of protest given to him. *Trottier v. Rivard*, Q. R. 23 S. C. 526.

**2. Accommodation maker—Renewal note obtained by fraud of principal maker—Right to sue on original note—Division Court—Power to amend—Evidence.]**—The defendant joined in making a promissory note, as the payee, the plaintiffs, knew, for the accommodation of his co-maker. When it became due, the latter brought a renewal note, purporting to be signed by the defendant, which the payee accepted, and gave up the original note stamped "paid." The primary debtor becoming insolvent and dying, and the plaintiffs failing to get payment of the renewal note out of his estate, they sued the defendant upon it, in a Division Court, where there was a trial by jury. The defendant swore he never signed the renewal note, but, nevertheless, there was a verdict for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge at the trial allowed the plaintiffs to claim in the alternative upon the original note, as well as claiming upon the renewal note, and to amend their claim accordingly. The jury then returned a verdict for the plaintiffs on the original note. The defendant applied for a new trial, which was refused, and he then appealed to this Court:—*Held*, that the Division Court Judge had jurisdiction to amend the plaintiffs' claim as he had done, under Rule 4 of the Division Courts.—2. That the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by the primary debtor's fraud to give him up the original note, the plaintiffs retained a right to recover in equity on the original note.—3. That a witness was entitled to refer to entries in the books of the primary debtor, made by him or under his direction, to refresh his memory. *Matthews v. Marsh*, 23 Occ. N. 154, 5 O. L. R. 540.

**3. Account stated—Amendment—Final judgment—Appeal.]**—In an action on an alleged promissory note in the Territorial Court of the Yukon, the plaintiffs' counsel, at the close of his case, asked leave to amend the claim by inserting counts on an account stated, and leave was refused. The trial proceeded, and the claim on the note was dismissed, and a reference was ordered for the purpose of taking accounts, and an order to that effect was taken out on the 23rd May, without specifying the date from which the accounts were to be taken. On taking the accounts, the referee, at the direction of the Judge, as to which it did not appear that the plaintiffs had notice, took the accounts as

beginning at a date unsatisfactory to the plaintiffs, and the referee's report was confirmed by the Judge:—*Held*, on appeal, that, as the plaintiffs should have been allowed to amend their pleadings, although the order of the 23rd May was final as far as the claim on the note was concerned, and an appeal from it had not been brought in time, yet, as an amendment had been improperly refused, and the Judge, in giving his judgment of the 23rd May, had not made it clear to the plaintiffs what his judgment really decided, the case should be examined on the merits:—*Held*, on the merits, that the judgment of DUGAS, J., must be affirmed. *Belder v. McDonald*, 23 Occ. N. 141, 9 Brit. Col. L. R. 377. Reversed, 23 S. C. R. 321.

**4. Action for money demand—***Plea of bill of exchange—Reply that bill not paid—Necessity for deposit of bill.*—Where the defendant pleads that the plaintiff has drawn upon him a bill of exchange for the amount of the claim, the plaintiff may reply that the bill is overdue and unpaid, and this without depositing the bill in Court; the neglect to deposit will only affect the costs. *McKee v. Falardeau*, 5 Q. P. R. 159.

**5. Action on promissory note—***Pleading—Consideration—Administrators—Illegal appointment by foreign Court.*—A defendant, sued upon a promissory note, may plead that the note was given without consideration and may set this up as a defence against the holder deriving his title from administrators illegally appointed by a foreign Court. *Poirier v. Arnault*, 5 Q. P. R. 139.

**6. Action on promissory note—***Pleading—Irregular protest—Affidavit.*—A plea to an action against the indorser of a promissory note, alleging that notice of protest was not regularly given, should set out specially the irregularity complained of; and, further, such plea must be supported by affidavit establishing the facts alleged: Art. 208, C.C.P. *Western Loan and Trust Co. v. Ross*, Q. R. 12 K. B. 226.

**7. Action on promissory notes—***Insolvency of defendant—Notes maturing pending action—Amendment.*—A plaintiff who sues on several notes, some of which would not yet be due but for debtor's insolvency, may subsequently, by supplementary declaration, plead that some of those notes have matured and have been protested since the action. *Molsons Bank v. Steel*, 5 Q. P. R. 237.

**8. Cheque—Marking by bank—***Fraudulent alteration—Money paid under mistake of fact—Negligence—Notice of dishonour—Reasonable delay.*—A

cheque for \$5 certified by the respondent bank's stamp was fraudulently altered to \$500 and paid by the respondent bank to the appellant bank, holders for value, under a mistake of fact, which was not discovered till the next day. In an action by the respondents to recover back \$495 from the appellants:—*Held*, that the respondents were at liberty to prove, as between themselves and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified. *Schofield v. Earl of Londesborough*, [1896] A. C. 514, followed.—2. No negligence was imputable to the respondents in cashing the cheque without examining the drawer's account; and, even if it were, it did not induce the appellants to treat the cheque as good. *Kelly v. Solari*, 9 M. & W. 54, approved.—3. Notice of forgery was unnecessary, and the cheque for \$5 was not dishonoured; and, accordingly, the stringent rule laid down in *Cocks v. Masterman*, 9 B. & C. 902, 33 R. R. 365, to the effect that notice of dishonour of a bill of exchange must be given on the due date, did not apply. The rule will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay. Judgment in 21 Occ. N. 400, 31 S. C. R. 344, affirmed. *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49.

**9. Cheques—Forged indorsements—***Fraud of agent of insurance company—Payment by bank.*—N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications sent in by him to the head office were, with the exception of some five, on the lives of fictitious persons, and, as to these five, the insurances had subsequently lapsed, of which fact the company were kept in ignorance. Afterwards N. representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the fictitious claimants and forging their alleged signatures thereto, whereupon cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt thereof, to see the payees and procure discharges from them. On receipt of these cheques the indorsements of the fictitious payees' names were forged, and the cheques presented to the bank and paid in good faith, the amounts thereof being charged to the company's account:—*Held*, that the company were affected by what had been done by N. so as to preclude them from disputing the right of the bank to pay the cheques and charge the plaintiffs with the amounts thereof.

*London Life Ins. Co. v. Molsons Bank*, 23 Occ. N. 155, 5 O. L. R. 407.

**10. Duress—Verdict of jury.]**—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager:—*Held*, that the jury having believed the defendant's account and given him a verdict, which the evidence justified, such verdict ought to stand.—Judgment of Court of Appeal (16th October, 1901, unreported) affirmed. *Western Bank v. McGill*, 23 Occ. N. 36, 32 S. C. R. 581.

**11. Illegality—Consideration—Election fund.]**—There can be no recovery upon a promissory note given for the purpose of raising funds to be used at an election, or upon a renewal of such a note. *St. Pierre v. L'Ecuyer*, Q. R. 23 S. C. 495.

**12. Lost note — Action on — Security.]**—The payee of a lost promissory note cannot sue upon the note, simply offering to reimburse the maker if the note is found, but he must offer to give security that the maker shall not be troubled on account of the note.—2. This rule applies as well to the case of a non-negotiable note which is probably destroyed, as to that of a negotiable note which is simply lost. *Pillow and Hersey Co. v. L'Espérance*, Q. R. 22 S. C. 213.

**13. Payment—Accord and satisfaction—Mistake—Principal and agent.]**—On being pressed for payment of the amount of a promissory note, the defendant offered to convey a lot of land (which he then shewed to the plaintiffs' agent) to the plaintiffs in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs, but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been inspected at the time the offer was made. More than a year afterwards the plaintiffs sued the defendant on the note, and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them, and at the trial the plaintiffs recovered judgment. On appeal to the full Court the judgment at the trial was reversed and the action dismissed:—*Held*, affirming the judgment in

9 Brit. Col. L. R. 257, that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt, and could not recover on the promissory note. *Pither v. Manley*, 23 Occ. N. 64, 32 S. C. R. 651.

**14. Pledgee of promissory note—Holder—Exchange.]**—1. A pledgee of a promissory note given as collateral security, is a holder in good faith.—2. A promissory note given in exchange for another note which had been handed over by the owner for collection, is the property of the person who owned the note for which it was given in exchange. *Béanger v. Robert*, Q. R. 21 S. C. 518.

**15. Prescription—Notarial note on brevet—Term.]**—A promissory note made before a notary *en brevet*, signed by a farmer, in favour of a person who is not a trader, for money lent, is subject to a prescription of 30 years. *Robert v. Charbonneau*, Q. R. 22 S. C. 466.

**16. Prescription — Part payment—Proof of—Payment by curator of insolvent.]**—In a commercial matter part payments, amounting to a tacit acknowledgment, having the effect of interrupting prescription, may be proved by witnesses.—2. Article 1235, C.C., line 1, does not apply to a promissory note, the proof of promissory notes and bills of exchange being, by the terms of Art. 2341, subject to the law existing in England in 1849.—3. The payment of dividends by the curator of a person who has made an assignment of his property, has the same effect as to interrupting prescription as a payment made by the debtor himself. *Boulet v. Metayer*, Q. R. 23 S. C. 289.

**17. Prescription — Statute of Limitations—Acknowledgment—Executor de son tort—Payments by—Bills of Exchange Act—Dominion and Provincial legislation.]**—A payment or acknowledgment by an executor *de son tort* cannot be relied on to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased. But where the executor *de son tort* has made payments of interest in respect to a promissory note, within six months before action commenced, and the holder of the note brings action against him to make him answerable to the extent of the goods of the deceased come to his hands, it is not open to the defendant, for the purpose of preventing a payment giving a new start to the Statute of Limitations (which effect it would have if made by the lawful personal representative), to rely on his having been a wrongdoer and not the true representative. As between himself

and the plaintiff, as respects payments made by the executor *de son tort* and their effect, the latter is to be treated as the true representative of the deceased.—The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or note contains, and therefore these consequences fall to be determined according to the law of the Province in which the liability is sought to be enforced. *Cook v. Dodds*, 23 Occ. N. 325, 6 O. L. R. 608.

**18. Protest—Waiver—Curator of insolvent.]**—The curator appointed upon an abandonment of property under the Code of Procedure has no authority, more particularly, as in the present case, without leave of a Judge of the Superior Court or the advice of the creditors or inspectors, to waive on behalf of the insolvent, protest of a promissory note indorsed by the latter, and a waiver under such circumstances does not bind the indorser. Judgment in *Q. R. 22 S. C. 474* affirmed. *Denenberg v. Mendelsohn*, *Q. R. 23 S. C. 128*.

**19. Protest—Waiver—Curator of insolvent.]**—The curator to an abandonment of property has no right to waive protest of a promissory note of which the insolvent is the indorser. *Molsons Bank v. Steel*, *Q. R. 23 S. C. 316*, 5 *Q. P. R. 184*.

**20. Protest—Waiver—Form of—Pleading.]**—The words "I hold myself responsible for my note," written and signed by the indorser upon the face of the note, amount to a waiver of protest; and a declaration alleging this fact is sufficient in law. *Ranger v. Aumais*, 5 *Q. P. R. 450*.

**21. Stamp Act, 1853, s. 19 (Imp.)—Application to British Columbia—Bills of Exchange Act—Intention of—Company—Cheques—Powers of manager.]**—A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that bank.—*Held*, that the Bank of Montreal were liable to the company for the amount of the cheques so cashed.—Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act.—Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing

schedule to the Act.—The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques, and promissory notes. *Hinton Electric Co. v. Bank of Montreal*, 23 Occ. N. 292.

See **BANKS AND BANKING**, 1, 2, 4—**CONSTITUTIONAL LAW**, 8—**COSTS**, 1, 4—**COURTS**, V. 2—**GIFT**, 1, 2—**INSURANCE**, III. 7, 8—**LIS PENDENS**, 2—**NEGLIGENCE**, 8—**PARTNERSHIP**, 1, 8—**PRINCIPAL AND AGENT**, 5.

## BILLS OF LADING.

See **BANKS AND BANKING**, 1—**CARRIERS**, 1—**RAILWAY**, II. 2.

## BILLS OF SALE AND CHATTEL MORTGAGES.

**1. Foreign chattel mortgage—Removal of goods to Territories—Non-registration—Rights of mortgagee—Bona fide purchaser.]**—A chattel mortgage made in a foreign country upon goods there, which is valid and binding there as against not only the mortgagor but also subsequent mortgagees and purchasers, is valid and binding to the same extent in the Territories, notwithstanding that the provisions of the Bills of Sale Ordinance of the Territories have not been complied with.—Where, therefore, goods then being in a foreign country were comprised in such a mortgage and subsequently removed to the Territories, and there taken by the agent of the mortgagee out of the possession of a *bona fide* purchaser for value without notice of the mortgage, and the latter sued the agent for conversion:—*Held*, that the plaintiff could not succeed. *Bonin v. Robertson*, 2 Terr. L. R. 21, 14 Occ. N. 150.

**2. Taking possession—Bills of Sale Act—Defeasance—Authority of partner to execute bill—Locus standi of creditor.]**—Where the goods comprised in a bill of sale were within 21 days after its execution *bona fide* taken possession of by the bargainee, the Bills of Sale Act was held not to apply, and it was immaterial that the bill was subject to a defeasance not contained in it.—*Semble*, that a judgment creditor of the bargainors (a partnership) had no *locus standi* to attack the bill on the ground that a member of the firm had no authority to execute the bill on behalf of the firm.—*Held*, that he had implied authority, or that his act was ratified, or that his partners were estopped from denying his authority. *McClary Mfg. Co. v. Howland*, 9 Brit. Col. L. R. 479.

See **BANKRUPTCY AND INSOLVENCY**, V. 1, 2—**INTEREST**, 1—**LANDLORD AND TENANT**, III. 7—**PLEADING**, X. 3—**SALE OF GOODS**, II. 1.

## BOARD OF HEALTH.

See **MUNICIPAL CORPORATIONS**, XIII. 2—**PUBLIC HEALTH**.

## BOND.

See **ARREST**, I., II.—**MUNICIPAL CORPORATIONS**, XVI. 3—**RAILWAY**, I.—**SHERIFF**, 1—**WILL**, II. 5.

## BONUS.

See **MUNICIPAL CORPORATIONS**, III. 1.

## BOUNDARIES.

See **MUNICIPAL CORPORATIONS**, XVI. 4, 9—**RAILWAY**, VII. 1—**TRESPASS TO LAND**, 3.

## BOUNTIES.

See **CROWN**, IV. 1.

## BRIBERY.

See **PARLIAMENTARY ELECTIONS**, III.—**PENALTIES AND PENAL ACTIONS**, 2.

## BRIDGE.

See **NEGLIGENCE**, 5—**RAILWAY**, V. 2—**WAY**, I. 2.

## BRITISH COLUMBIA PROVINCIAL ELECTION ACT.

See **CONSTITUTIONAL LAW**, 1.

## BROKER.

**Action by stock-broker—Gaming transaction—Contract void.**—The plaintiff, a stock broker, brought an action against the defendant for a balance alleged to be due on account of certain transactions. The defendant pleaded that the alleged contract was illegal, and there-

fore null and void. The evidence shewed that the corn and cotton which were the subjects of the alleged contract were never delivered, and that there was no intention that they should be delivered:—*Held*, that the contract sued on was a gaming one and was therefore prohibited by law.—*Forget v. Ostigny*, [1885] A. C. 318, distinguished.—2. That the broker, having knowledge of the nature of such contract, had no recourse against his client for moneys advanced in furtherance of such contract.—3. That, even if the defendant had recognized his debt and offered his property to cover the same, as alleged by the plaintiff, such acknowledgment was of no effect, as the debt claimed resulted from an illegal contract.—4. That, in any event, the responsibility of a person speculating in stocks to his broker is limited to his margin, unless he has given contrary instructions. *Morris v. Broult*, 23 Occ. N. 120, Q. R. 23 S. C. 190.

## BUILDER'S PRIVILEGE.

See **MECHANICS' LIENS**, 2.

## BUILDING.

See **CONTRACT**, VIII. 4—**LIMITATION OF ACTIONS**, II. 2—**NEGLIGENCE**, 6.

## BUILDING CONTRACT.

See **ARBITRATION AND AWARD**, 3—**CONTRACT**, I.

## BUILDING SOCIETY.

**Mortgage — Mortgagor becoming shareholder — Liability for losses.**—It was held that, under the mortgage in question in this case and the by-laws and rules of the defendants and their predecessors in interest applicable thereto, the plaintiff was entitled to a discharge of his mortgage, given in form as collateral security for the payment of shares subscribed for by him, upon payment of the principal and interest as therein provided; and that the defendants could not charge against the mortgage a share of losses incurred in the management of the company.—*Judgment of MACMAHON, J.*, 3 O. L. R. 191, 22 Occ. N. 60, reversed. *Lee v. Canadian Mutual Loan and Investment Co.*, 23 Occ. N. 165, 5 O. L. R. 471.

See **MORTGAGE**, 1—**TRUSTS AND TRUSTEES**, 3.



**BY-LAWS.**

See COMPANY, I. 1—MUNICIPAL CORPORATIONS, 1.—TRADE UNION, 1.

**CABS.**

See MUNICIPAL CORPORATIONS, II.

**CANADA EVIDENCE ACT.**

See CRIMINAL LAW, I. 1, II. 12.

**CANADA TEMPERANCE ACT.**

**Convictions—Motion to quash—Convictions not properly before Court—Certiorari.**—An application to quash two convictions for violations of the Canada Temperance Act was made, upon reading an affidavit of the defendant, and an order made by a Judge for a return of papers, and the return thereto. The order and return were made in connection with a previous application of the defendant for his discharge from imprisonment:—*Held*, that there being no writ of certiorari, and no proper return thereto, the matter was not properly before the Court, and the Court had no jurisdiction to quash the convictions:—*Held*, that the mere fact of the papers referred to being found on the files of the Court was not sufficient to constitute a cause in court, in respect to which the application to quash the convictions could be made:—*Semble*, that a writ which required the sending up of papers in two distinct causes would be liable to attack on the ground of multifariousness. *Rea v. McDonald*, 35 N. S. Reps. 323.

**CAPIAS.**

See ARREST, III. 1, 6—BANKRUPTCY AND INSOLVENCY, I. 14—SHERIFF, 2.

**CARRIERS.**

**1. Agreement for carriage of goods—Cost of transport—Bills of lading—Non-delivery of goods—Damages.**—The appellant had made an agreement with the agent of the respondent company, at a fixed price and under penalty, for the delivery of goods which were to be forwarded from Paris, France. The respondent, having brought a package to Montreal, addressed to the appellant, refused to deliver it unless the appellant

paid \$11.84 for disbursements and expenses of conveyance, but did not produce the bills of lading and way bills, which had been sent to him at New York:—*Held*, that the respondent company could not, arbitrarily and before the delivery, impose on the appellant the payment of this sum, without verification and right of subsequent reimbursement for any overcharge, if there was any, and that the respondent should make to the appellant an indemnity for damages which the non-delivery had caused him. *Pointron v. American Express Co.*, Q. R. 12 K. B. 311.

**2. Injury to goods—Liability—Negligence—Contract—Owner—Consignor.**—A carrier cannot stipulate that, by reason of the tariff of charges for the transport of goods being reduced, he shall not be responsible for damages which may be caused to the goods carried by the fault or negligence of his servants, but when such a stipulation has been made, the owner of the goods damaged in conveyance has to prove that the damage was caused by such fault or negligence. 2. The owner of goods is bound by the contract of carriage signed by the person forwarding them. *Drainville v. Canadian Pacific R. W. Co.*, Q. R. 22 S. C. 480.

**3. Special contract—Variation—Authority of agent—Limiting liability—Sale of goods—Conversion—Damages.**—Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of the "safe keeping and carriage of goods," even though caused by the negligence of the carriers' servants, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carriers.—A shipping receipt, with terms as above, was for carriage by the defendants' line and other connecting lines, and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff, but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold, at an intermediate point on a connecting line, by the company in control, on account of non-payment of freight:—*Held*, that the plaintiff's agent at the shipping point had no authority to consent to a variation of the special contract, nor could the carriers vary it without the concurrence of the plaintiff; that the sale amounted to

a wrongful conversion of the goods by the defendants; and that they were not exempted by the terms of the shipping receipt from liability for their full value. Damages reduced by Supreme Court of Canada, instead of a new trial being ordered. Judgment in 22 Occ. N. 271, 9 Brit. Col. L. R. 82, reversed. *Wilson v. Canadian Development Co.*, 33 S. C. R. 432.

See NEGLIGENCE, 4—RAILWAY, II.

### CERTIORARI.

**1. Acquiescence in conviction — Bar.]**—The acquiescence of the accused in a conviction made by a justice of the peace, in a matter for summary trial, deprives the accused of his remedy by *certiorari*, even when moved for within the proper time. *Meunier v. Beauchamp*, 5 Q. P. R. 280.

**2. Evidence before magistrate.]**—The Court upon *certiorari* cannot inquire into the evidence taken before a magistrate whose conviction is in review. *Wing Tee v. Choquette*, 5 Q. P. R. 461.

**3. Motion for—Preliminary objection — Dismissal — Second application.]**—Where an application for a writ of *certiorari* has been dismissed, the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection. *Re v. Geiser*, 9 Brit. Col. L. R. 503.

**4. Motion to quash for delay—Necessity for notice to proceed.]**—Rule 188 of the Crown Rules (Nova Scotia) directs that in all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether prosecutor or defendant, who desires to proceed, shall give one calendar month's notice to the other party of his intention to proceed. The defendant, pursuant to the order of a Judge, removed a conviction made by a magistrate into the Court, and took no further steps in the matter. The informant moved to quash the *certiorari* on the ground that no steps had been taken by the defendant for upwards of a year:—*Held*, that the informant must first give one month's notice of intention to proceed. *Re v. McDonald*, 23 Occ. N. 17.

**5. Motion to quash for delay—Practice—Costs.]**—To an application by the prosecutor to quash a *certiorari* removing a conviction for delay in proceeding, it is not an answer that the defendant had given notice of motion to quash the conviction before the launching of the motion to quash the writ, as long as the

delay is unexplained. Costs were given against the defendant. *Re v. McDonald*, 23 Occ. N. 95.

See CANADA TEMPERANCE ACT—COSTS, VI. 5—COURTS, VIII.—EXTRADITION, 1, —LANDLORD AND TENANT, V. 2—LIQUOR ACT OF ONTARIO, 1—MUNICIPAL CORPORATIONS, I. 3, XV. 3—PILOTS, 2.

### CHAMPERTY.

**Contribution to costs of appeal—Members of family—Agreement to divide lands in question — Succession rights — Litigious rights—Deed—Description.]**—The appellants, who were desirous of recovering certain property, known as the Dorval Islands, which had formerly belonged to an ancestor, entered into an agreement with the respondents, who were all connected with the same family by relationship or marriage, by which, in consideration of each contributing one-tenth of the cost of taking an appeal to the Supreme Court, they agreed to transfer to each of them one-tenth of what might be recovered in the suit. The appeal was successful, and the present action was brought by the respondents to be declared proprietors of their shares of the islands:—*Held*, that the agreement was not champertous, all the parties contributing to the cost of the appeal having an interest to see the property restored to the family, and either a direct or contingent expectancy of succeeding thereto. To constitute champerty there must be an unlawful interference of a third person to support litigation in a matter which in no way concerns him, for a compensation consisting of a share of the amount recovered.—2. Art. 710, C. C., had no application to this case, inasmuch as the rights sold by the appellants were not succession rights.—3. Art. 1582, C. C., cannot be invoked by the party who has sold a litigious right, to annul his own contract.—4. The real estate in question constituting a distinct and separate area, and bearing a single cadastral number, a special description thereof in the deed of sale was unnecessary. *Meloche v. Deguire*, Q. R. 12 K. B. 298.

### CHARGE ON LAND.

See ASSESSMENT AND TAXES, II.—INFANT, 4—LANDLORD AND TENANT, III. 1—OPPOSITION, 10—VENDOR AND PURCHASER, 9, 12—WASTE.

### CHARGING ORDER.

See SOLICITOR, 4.

**CHARTERPARTY.**

See SHIP, I.

**CHATTEL MORTGAGE.**

See BILLS OF SALE AND CHATTEL MORTGAGES.

**CHEQUE.**

See BANKS AND BANKING, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 8, 9, 21—GIFT, 1.

**CHINESE IMMIGRATION.**

See ALIENS.

**CHOSE IN ACTION.**

See INSURANCE, III. 9—WILL, II. 18.

**CHOSE IN ACTION—ASSIGNMENT OF.**

**1. Equitable assignment—Form of—Solicitor.]**—No writing or particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest being all that is required. *Hughes v. Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163, approved. A client who was indebted to a solicitor for costs incurred, instructed him that, on the receipt by him of certain moneys which he was to collect for the client, he was to pay certain obligations, including his own bill of costs:—*Held*, that this constituted a good equitable assignment. *Re McRae Estate*, 6 O. L. R. 238.

**2. Money payable "in respect of the contract"—Damages for interference with the work—Attachment of debts.]**—A contractor for the construction of a drain assigned to a bank as security for advances "all and every sum or sums of money now due or to become due and payable to me by (the employer) in respect of a certain contract existing between myself and the said (employer) for the construction of section 3 of the drain," describing it. The cost of doing the work was increased owing to the employer negligently allowing water to flow into the drain, and the contractor obtained a judgment against the employer for damages for the negligence:—*Held*, that the amount payable under this judg-

ment passed to the bank as money payable in respect of the contract, and was not attachable by a judgment creditor of the contractor. *Graham v. Bourque*, 23 Occ. N. 334, 6 O. L. R. 428.

**3. Non-acceptance—Action by assignor.]**—A creditor who assigns a debt due him to a creditor of his own, does not thereby lose his right of action against his debtor, so long as his creditor has not accepted the assignment. *Legault v. Désautniers*, 5 Q. P. R. 444.

**4. Notice—Service—Notary.]**—It is not necessary that service of a notice of a transfer of a debt should be made through the instrumentality of a notary. *Bayard v. Drouin*, Q. R. 22 S. C. 420.

**5. Notice—Sufficiency—Notarial act—Debtor—"Third person."]**—Under Arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the act of sale of his debt need not be by a notarial act.—*Quere*, whether the debtor is a "third person," within the meaning of the latter Article, against whom signification was necessary in order to perfect possession. *Murphy v. Bury*, 24 S. C. R. 688, doubted. The institution of an action against the debtor is of itself a sufficient signification of the transfer of the debt. Judgment of the Court of King's Bench, Quebec, affirming judgment in Q. R. 21 S. C. 251, reversed. *Bank of Toronto v. St. Lawrence Fire Ins. Co.*, [1903] A. C. 59.

**6. Notice to debtor—Judicature Act—Sufficiency of notice.]**—H., to whom the defendants owed \$184.93, being \$124.80 for oak lumber, and \$60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice which the plaintiff gave the defendants of this assignment stated that he had an order from H. for the amount due in respect to a purchase of oak lumber bought by the defendants' agent. At the same time an account of H.'s against the defendants in the matter went to shew that, as above stated, only \$124.80 was due for oak lumber, while the balance, \$60.13, was for basswood lumber. The plaintiff drew on the defendants for the amount, and the defendants refused to accept the draft, on the ground that they had no order from H. to pay the \$184.93. Thereupon the present action was brought:—*Held*, that, though there was sufficient to put the defendants upon inquiry in the notice they received, as to an assignment to the plaintiff of the money due by them to H., yet it was not sufficiently clear and express to entitle the plaintiff to sue, under the section of the Judicature Act relating to assignments of choses in action, being ambiguous enough to justify them in asking the plaintiff whether the

assignment covered the oak lumber only, or the basswood as well as the oak.—The statute requires the notice to be express notice in writing, and there should be nothing equivocal about it, nothing to put the debtor in doubt whether the whole debt or only a part of it has been assigned. The notice here fell short of this requirement. *McMillan v. Orillia Export Lumber Co.*, 23 Occ. N. 244, 6 O. L. R. 126.

**7. Right to sue in name of assignor—Acceptance of assignee by debtor—Votation.]**—The plaintiffs had transferred to another loan company their claim against the defendant. Subsequently the defendant accepted the transferees as his creditors, and by agreement became their debtor:—*Held*, that, in these circumstances, the transferees had no right of action in the name of their transferors against the defendant, although the deed of transfer, to which the defendant was not a party, authorized the transferees to use the name of the transferors; the transferees must bring the action in their own name. *Montreal Loan and Investment Co. v. Plourde*, O. R. 23 S. C. 399.

## CHURCH.

**1. Vestry-board — Defence of action—Authorization—Parish meeting—Exception to form.]**—A vestry-board cannot defend an action without previous authorization by the parish meeting, and the board must file this authorization with its defence, in default of which the plaintiff may, by exception to the form, obtain the striking out of the defence. *Senécal v. Curé and Churchwardens of St. Paul*, Q. R. 12 K. B. 142.

**2. Will—Devise to religious institution—"Acquisition" of land—Commencement of period—Life estate.]**—The seven years during which a religious institution may hold land after its "acquisition" under s. 19 of R. S. O. 1877 c. 216 (now s. 24 of R. S. O. 1897 c. 307), does not commence to run, in the case of a devise of a remainder dependent upon a life estate, until the expiry of the life estate. *In re Naylor*, 23 Occ. N. 69, 5 O. L. R. 153.

See HUSBAND AND WIFE. III. 1—PARTIES, 10. 11—WILL, I. 1, II. 4.

## CHURCHWARDEN.

See NOTICE OF ACTION, 2.

## CIRCUIT COURTS, QUEBEC.

See COURTS, VII.

## CITY COURT OF ST. JOHN, NEW BRUNSWICK.

See COURTS, III.

## CIVIL SERVICE ACT.

See CROWN, IV. 3.

## CLOSE OF PLEADINGS.

See PLEADING, VIII. 4.

## CLUB.

**Liability for article stolen.]**—The plaintiff, who was not a member of the defendant club, went there upon the invitation of a member and put his coat in the cloak room. It was taken away during his absence in another part of the club, and he sued for its value and for money paid to detectives in attempting to recover it:—*Held*, that, as the defendants were a club, and did not fall under the provisions of the Civil Code respecting innkeepers, keepers of boarding-houses, and hotel-keepers, under similar circumstances, they were not liable for articles brought upon their premises. *Martel v. Military Institute Club*, 23 Occ. N. 119.

## COLLISION.

See SHIP, II.

## COLLUSION.

See LIEN, 4.

## COMMISSION (AGENTS).

See MASTER AND SERVANT. I. 2—PRINCIPAL AND AGENT, 1, 7, 8, 9, 10.

## COMMUNITY.

See HUSBAND AND WIFE, II.

## COMPANY.

### I. DIRECTORS—POWERS OF.

### II. SHARES AND SHAREHOLDERS.

### III. WINDING-UP.

### IV. OTHER CASES.

See **BILLS AND NOTES**, 21—**BUILDING SOCIETY—CONSTITUTIONAL LAW**, 5, 6, 11, 12—**COSTS**, VI. 6, VII. 4—**DEFAMATION**, I. 4—**DISCOVERY**, I. 3, 6, 7—**INTEREST**, 4—**PARTNERSHIP**, 4—**RECEIVER—WRIT OF SUMMONS**, I. 2, 9.

### I. DIRECTORS—POWERS OF.

**1. Appointment of manager**—*Want of by-law and seal—Services rendered—Salary—Compensation.*—The plaintiff was appointed by the board of provisional directors of a company to be a director, and was also appointed manager before the company was organized. In an action for salary or compensation for services rendered, in which it was shewn that the services rendered had not resulted in any benefit to the company, and that the company had never gone into operation:—*Held*, that, as he was not appointed by by-law approved of by the shareholders, and had no contract under seal, he could not recover. *In re Ontario Express and Transportation Co.*, 25 O. R. 581, commented on. *Birnie v. Toronto Milk Co.*, 23 Occ. N. 11, 5 O. L. R. 1.

**2. Articles of association—Privileged shareholders—Right to elect majority of directors—Ultra vires.**—In the memorandum of association of a joint stock company organized under the British Columbia Companies Act, 1890, and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect 3 of the 5 directors, notwithstanding anything in the Act:—*Held*, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was beyond the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of directors imposed by the Act as matters of public policy. Judgment in 9 Brit. Col. L. R. 275 reversed. *Colonist Printing and Publishing Co. v. Dunsmuir*, 23 Occ. N. 65, 32 S. C. R. 679.

**3. Managing director—Warehouse receipt—Disappearance of goods.**—The failure of an individual director of a warehousing company, to inform the hol-

der of a warehouse receipt of the disappearance of the goods covered by such receipt, does not, in the absence of any accusations of fault against the director in respect thereof, give the holder of such receipt a right of action against him. *Ontario Bank v. Merchants Bank of Halifax*, 5 Q. P. R. 392.

**4. Mortgage—Consent of shareholders—Ratification.**—The judgment in 8 Brit. Col. L. R. 314 affirmed. *Adams v. Bank of Montreal*, 32 S. C. R. 719.

See *post*, II. 4, IV. 5.

### II. SHARES AND SHAREHOLDERS.

**1. Deprivation of shares—Remedy—President of company.**—A company which, along with its president, appropriates to itself shares of its capital to the prejudice of a shareholder, is bound to indemnify the shareholder against the injury caused to him. *Acer v. Percy*, 5 Q. P. R. 401.

**2. "Payment in cash"—Transfer of business.**—A company incorporated to take over a business carried on by the defendants in partnership, entered into possession, and in payment for his relative interest in the business each defendant received a corresponding number of shares at par value:—*Held*, that the payment for the shares was a "payment in cash" within the meaning of s. 50 of the Companies Act, and as the purchase price was fair, the shares were fully paid up. *Tanner v. Cowan*, 9 Brit. Col. L. R. 301.

**3. Power to interfere in ordinary management.**—The shareholders in a company incorporated under the Companies Act, 1890, have no power to interfere in the ordinary management of the company by the trustees, who have the exclusive right of exercising corporate powers and of making by-laws. *Dunsmuir v. Colonist Printing and Publishing Co.*, 9 Brit. Col. L. R. 290.

**4. Transfer—Subscription—Payment to director—Winding-up—Contributories.**—Certain persons assumed to buy shares of a company and received certificates therefor. They signed powers of attorney authorizing an agent of the company "to receive from the vendors a transfer" of shares and to sign an acceptance. No transfers were made, but the powers of attorney were pasted in the transfer book. Several months afterwards a director filled in opposite the names of the appointers transfers of shares as from himself, and procured the agent as their attorney to accept the transfers, for which the agent was paid a commis-

sion out of the company's funds:—*Held*, in winding-up proceedings, that the transfers were invalid and the director was a contributory in respect of the shares which he purported to transfer.—The payment of the commission to the agent was bad, and the director was liable to refund it.—Shortly after the incorporation of the company, at a meeting of the provisional directors, who were then the only shareholders, a resolution was passed authorizing the payment to one of the provisional directors, afterwards a director, of \$300 out of capital, for alleged services. It did not appear that any service had been rendered by him. The minutes of this meeting were confirmed at a subsequent shareholders' meeting. At the time no profits had been made and nothing paid on account of the stock. No by-law was passed. The payment was subsequently made:—*Held*, that the director was bound to refund. *In re Publishers' Syndicate, Paton's Case*, 5 O. L. R. 392.

See *ante*, I. 2. See also TRUSTS AND TRUSTEES, 3.

### III. WINDING-UP.

#### 1. Execution — Opposition—Costs.]

—A party attempting to execute a judgment against the property of a company in liquidation will be adjudged to pay the costs incurred by an opposition made to such execution by the liquidator. *Great North Western Telegraph Co. v. Le Monde Journal Co.*, 5 Q. P. R. 379.

#### 2. Final order — Appealable order—Order dissolving company — Order rescinding.]

—On the 24th March, 1902, a County Court Judge made an order, upon an affidavit of one of the liquidators, declaring that the association should be and was dissolved. On the 21st June, 1902, upon the application of a certain dissatisfied shareholder, an order was made by the Judge revoking his former order, and also another order which had been made by him on the 7th April, 1902, that no action should be proceeded with against the association except by leave of the Court:—*Held*, that the order of the 21st June, 1902, was an appealable order, for, even if the appeal to the Court of Appeal given by s. 27 of the Winding-up Act was to be restricted in its construction to appeals from final orders, yet the order of the 21st June, 1902, might be properly described as a final order, since it put an end to the order of dissolution theretofore made:—*Held*, also, *MACLENNAN, J.A.*, *dissentiente*, that the County Court Judge had no authority to make an order such as the one of the 21st June, 1902, inasmuch as

he had no other material before him when making the order than he had when making that of the 24th March, and there was no reason for saying that he had been misled in making the former order or that any fact had been suppressed; and that, therefore, the proper way to have attacked the order of the 24th March was by appeal, and not by application to the Judge to rescind it after it had been acted upon and become effective. *In re Equitable Savings, Loan, and Building Association*, 23 Occ. N. 182, 6 O. L. R. 28.

3. Leave to bring action—Secured creditors — Proving claims.]—A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security, but it is not optional for him to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under ss. 63 *et seq.* of the Act. *In re Lenora Mount Sicker Copper Mining Co.*, 23 Occ. N. 162, 9 Brit. Col. L. R. 471.

4. Liquidator — Appointment — Notice.]—The appointment of a liquidator for a company will be set aside if some one interested succeeds in shewing that such appointment has been made without notice to the creditors, contributories, and shareholders of the company. *Stimson v. North-West Cattle Co.*, 5 Q. P. R. 181.

5. Liquidator — Claim accruing before winding-up — Bank—Use of name—Amendment.]—Under the Dominion Winding-up Act, 1886, ss. 15 and 31, a company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name or in that of the company, according to the nature of the action; in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property. Where liquidators sued in their own name to recover a debt due to the company:—*Held*, that the error was one of form, which the Court had power to amend under ss. 516 and 521, C. C. P. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion. Judgment in *Q. R. 12 K. B. 120*, affirming judgment in *Q. R. 19 S. C. 556*, reversed. *Kent v. Community of Sisters of Charity of Providence*, [1903] A. C. 220.

6. Mechanic's lien — Priority—Jurisdiction of Court to order — Notice — Jurisdiction.]—The holders of mechanics'

liens filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in a County Court on the day on which the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid; the liquidator applied to the Court for leave to accept the proposal, and an order was made, without notice to the lien-holders, giving H. a first charge on the claims for his debt, and the amount advanced by him; afterwards, on H.'s application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge.—The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that they be declared to have priority over H.:—*Held*, that the order giving H. priority over the lien-holders was made without jurisdiction, and the lien-holders were not bound by it. *In re Ibez Mining and Development Co. of Slooan*, 23 Occ. N. 301.

**7. Petition by shareholder—Insolvency.**—Petition filed under s. 8 of R. S. C. c. 129, as amended in 1899 by 62 & 63 V. c. 43, s. 4, by certain shareholders for a winding-up order, on the ground that the company were insolvent, the act shewing the insolvency being alleged to be the exhibiting by the company of a statement shewing their inability to meet their liabilities, the doing of which is by s. 5 (c) of the Act made an act of insolvency:—*Held*, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. *In re United Canneries of British Columbia, Limited*, 23 Occ. N. 254.

**8. Petition by shareholder—Liabilities—Statement—Balance sheet.**—By s. 5 (c) of the Winding-up Act (Dominion) a company is deemed insolvent "if it exhibits a statement shewing its inability to meet its liabilities."—*Held*, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders.—On the hearing of a petition based on such a statement the statement must be accepted as correct.—Remarks as to company balance sheets. *In re United Canneries of British Columbia, Limited*, 9 Brit. Col. L. R. 523.

**9. Security taken bona fide—Inquiry as to regularity of proceedings—Liquidator suing in his own name—Liability for costs.**—A person who bona fide takes a security in the ordinary course of business from an incorporated company, is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly.—In this respect a shareholder stands on the same footing as a stranger.—Where an action is brought by the liquidator of a company in liquidation, in his own name, he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. *Jackson v. Cannon*, 23 Occ. N. 300, 10 Brit. Col. L. R. 73.

**10. Service of writ of summons—Corporate character—Law stamps—Alias writ.**—Service upon a company in liquidation is validly made at the office which it occupied, upon its secretary, who has continued to act as such in spite of the liquidation, and still has in his possession some of the books of the company.—2. The corporate character of a company continues notwithstanding that it has gone into liquidation.—3. It is not necessary to put law stamps upon the return of an alias writ of summons. *Soucy v. Compagnie d'Imprimerie Industrielle*, 5 Q. P. R. 195.

**11. Staying proceedings in another Province—Setting aside sale of foreign land—Summary proceedings.**—There is jurisdiction under s. 13 of the Dominion Winding-up Act, R. S. C. c. 129, to restrain proceedings in any action, suit, or proceeding against the company, even in actions or suits beyond the ordinary territorial jurisdiction of the Court; and the enforcing of an execution is a proceeding within this section; and therefore there was jurisdiction for the Court in this Province to make an order staying proceedings under an execution in the hands of the sheriff of the county of Victoria, in the Province of New Brunswick, as had been done in this case.—But the sheriff having, notwithstanding, proceeded with the sale under the execution against lands of the company, and executed a deed of the same to the purchaser:—*Held*, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void, such a case not coming within the classes of cases which, under the Act, may be dealt with in a summary manner by a Judge in the winding-up proceedings. *In re Tobique Gypsum Co.*, 23 Occ. N. 303, 6 O. L. R. 515.

See *ante*, II. 4. See also **BANKS AND BANKING**, 4—**REFPLEVIN**, 2.

#### IV. OTHER CASES.

##### 1. Electric lighting companies—Statutory powers—Concurrent exercise in same territory—Distance between wires.]

—Where the Legislature has given to two companies similar powers, to be exercised over the same territory, the Court must necessarily conclude that the Legislature has intended to give the companies concurrent powers; in such a case the Court, submitting to the legislative authority, should not intervene between the different companies unless and until one of them has infringed the rights acquired by the other.—2. In the case of two companies carrying on the business of electric lighting over the same territory, it seems that according to experts a distance of three feet between their wires is a sufficient distance to prevent any immediate danger. *Jacques Cartier Water and Power Co. v. Quebec R. W., Light, and Power Co.*, Q. R. 11 K. B. 511.

**2. Foreign company—Powers of president—Power of attorney.]**—The president of an incorporated company may institute and prosecute suits for the corporation, and appoint attorneys *ad litem* therefor, without express delegation of power or a resolution of the board of directors, and a power of attorney signed by the president of a foreign company, under its seal, is sufficient in law. *Standard Trust Co. v. South Shore R. W. Co.*, 5 Q. P. R. 257.

##### 3. Returns to Provincial Treasurer—Taxation—Default—Penalty—Navigation company—Agents—Pleading—Amendment.]

—In an action against two defendants, described as incorporated companies, for the recovery of penalties for non-compliance with the requirements of Art. 1149, R. S. Q., the plaintiff restricted his demand to the penalties for 300 days between two stated periods. The action was dismissed in the first Court, as to the first defendant, on exception to the form based on the ground that no such corporation as that described in the writ existed. The other defendants had not pleaded, and the plaintiff subsequently caused an amended declaration to be served on the attorneys, alleging that the defendant first mentioned was an unincorporated company, and claiming the same amount of penalties for a different period of 300 days, and as to which the prescription enacted by Art. 2615, R. S. Q., had accrued at the date of the service of the amended declaration unless prescription had been interrupted by the

service in the original action:—*Held*, affirming, but for different reasons, the judgment in Q. R. 22 S. C. 510, that prescription under Art. 2615 was not interrupted by the service of process in the original action, inasmuch as the period for which the penalty was claimed therein was not the same as the period claimed for in the amended declaration, and, moreover, the latter claim included a period for which the plaintiff had abandoned his claim in the original action. Further, the original action being brought against the defendant as the agent of an incorporated company, whereas the amended declaration alleged that the defendant was the agent of an unincorporated company, such amendment should not have been allowed, inasmuch as it changed the nature of the demand within the meaning of Art. 522, C.C.P. *Lambe v. Donaldson Steamship Line and Navigation Co.*, Q. R. 23 S. C. 460.

##### 4. Sale of gas works to municipality—Arbitration as to price—Franchise—Ten per cent. addition.]

—By 54 V. c. 107 (O.) the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option:—*Held*, affirming the decision of LOUNT, J. 3 O. L. R. 637, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company; and in refusing to add ten per cent. to the price as upon an expropriation under R. S. O. 1887 c. 164, s. 99. *In re City of Kingston and Kingston Light, Heat, and Power Co.*, 23 Occ. N. 151, 5 O. L. R. 348.

**5. Toronto Gas Company—Increase of capital—Statutory restrictions—Payments to directors—Dividends—Reserve fund—Investment in business—Plant and buildings renewal fund—Reduction in price of gas—Audit by municipality—Charges for depreciation or loss—Construction of statute.]**—Upon a consideration of the provisions of 50 V. c. 85 (O.), an Act to further extend the powers of the Consumers' Gas Company of Toronto:—*Held*, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their other property, and invested in the



securities mentioned in s. 4, but were at liberty to use it in their business, as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of the defendants' property which it had helped to acquire while invested in the business.—2. That charges for decrease in the value of gas mains, for iron gas lamps which became useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within s. 6 so as to be chargeable to the plant and buildings renewal fund.—3. That under s. 6 the defendants were entitled to continue to contribute to the plant and buildings renewal fund the five per cent. authorized, even although it should not appear necessary to do so for the purposes for which the fund was to be used.—These sections were construed in *Johnston v. Consumers' Gas Co.*, 27 O. R. 9, upon a special case, but the decision was reversed (23 A. R. 566, [1898] A. C. 477), although not on the question of construction:—*Held*, that the Court was not bound by the views expressed in that case. *City of Toronto v. Consumers' Gas Co. of Toronto*, 23 Occ. N. 197, 5 O. L. R. 494.

### COMPOSITION.

See BANKRUPTCY AND INSOLVENCY, IV.

### CONCUBINAGE.

See GIFT, 6.

### CONDITIONAL SALE.

See FIXTURES, 2, 3—SALE OF GOODS, II.

### CONFESSION OF DEFENCE.

See JUDGMENT, IV. 1, 2.

### CONSOLIDATION OF ACTIONS.

**Damages from same accident.]—**When several plaintiffs sue for damages alleged to have been caused by the same defendant and arising out of the same accident, such causes may be united for the purposes of proof, except as to the amount of damages suffered by each claimant respectively. *Cantin v. Royal Electric Co.*, 5 Q. P. R. 327.

See MORTGAGE, 1—STAY OF PROCEEDINGS—TRIAL, VI.

### CONSPIRACY.

**Combination—Injury to business—Restraint of trade—Rights of individuals.]—**This action was brought against a number of individual persons, partnership firms, and corporations, to recover damages for an alleged conspiracy against the plaintiff, and for an injunction restraining "the defendants and each of them from continuing to boycott the plaintiff and from continuing to conspire to injure his business, trade, and credit:—*Held*, that there was no conspiracy to do any act, or for any object, or to use any means, illegal if done or pursued or used by an individual. The combination was not unlawful by reason of its being a combination of several, because it was in the exercise of defendants' own rights of trading in competition with the plaintiff and the "McIntyre block people" and for the protection of those rights. The plaintiff had no absolute right to trade free from competition or free from the right of the defendants to combine to compete effectively with him or the "McIntyre block people" by the use of means not unlawful in themselves. The combination and the pursuit of its objects, therefore, did not affect any legal right of the plaintiff or operate to do him a legal injury. *Gibbins v. Metcalfe*, 23 Occ. N. 308.

See CRIMINAL LAW, III. 11—PLEADING, I.

### CONSTABLE.

See NOTICE OF ACTION, 3.

### CONSTITUTIONAL LAW.

**1. Aliens—Naturalization—British Columbia Provincial Elections Act—Powers of Provincial Legislature—B. N. A. Act.]—**Section 91, s.s. 25, of the British North America Act reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted. The Provincial Legislature has the right to determine, under s. 92, s.s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not *ultra vires*. Judgment in 21 Occ. N. 424, 8 Brit. Col. L. R. 76, reversed. *Cunningham v. Tomey Homma*, [1903] A. C. 151.

**2. Ferry—Creation and license—*Jura regalia*—Dominion or Province—Public harbour—River improvements.]**—The right to create and license a ferry, having been one of the *jura regalia* or royalties which belonged to the Provinces at the union, so continued after Confederation, as declared by s. 109 of the B. N. A. Act; and therefore the lease of a ferry between the town of Sault Ste. Marie, in the Province of Ontario, and the town of Sault Ste. Marie, in the State of Michigan, granted by the Dominion Government in 1897, was invalid.—The exclusive legislative authority over ferries given to the Dominion Parliament by s.s. 13 of s. 91 does not carry with it any right to grant ferries.—Even if the St. Mary's river at the point in question were a public harbour which passed under s. 108 to the Dominion, this would not give the Dominion Government the right to grant an exclusive ferry privilege. But it is not a public harbour; something more is necessary to convert an open river front into a public harbour than the erection along it of four or five wharves projecting beyond the shallows of the shore.—The existence of improvements in the river bed in front of the town, belonging to the Dominion Government, afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government.—The Dominion Parliament or Government have a right to regulate such ferries as the ferry in question, for the purpose of preventing them from interfering with public harbours and river improvements of the Dominion. *Perry v. Clergue*, 23 Occ. N. 91, 5 O. L. R. 357.

**3. Ferry—Exclusive privilege—North-West Territories Legislative Assembly—Municipal institutions—Property and civil rights—Delegation of powers—License—Tolls—Highway—By-law—Private ferry.]**—The Legislative Assembly of the Territories has power to pass an Ordinance providing for the issue of an exclusive license to ferry over a navigable river and for the imposition of tolls. Such power is conferred upon the Assembly by one, if not both, of the following provisions of the Dominion Order-in-Council of 26th June, 1893—made under the authority of the North-West Territories Act—which authorizes the passing of Ordinances in relation to:—3. Municipal Institutions in the Territories—subject to any legislation by the Parliament of Canada as heretofore or hereafter enacted. (See B. N. A. Act, s. 92, s.s. 8.)—8. Property and civil rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects. (See B. N. A. Act, s. 92, s.s. 16.)—The power of the Legislative Assembly to delegate its powers discussed.—The question of the extent of the jurisdiction

of the Legislative Assembly over surveyed highways, the control of which has been given by Parliament to the Legislative Assembly, discussed.—A municipality having by Ordinance been given, with respect to a certain portion of a navigable river, all the powers of the various officers named in the Territorial Ordinance respecting ferries:—*Held*, that it was not necessary for the municipality to exercise its powers by by-law; and that an agreement with, and a license to, the licensee, both under the corporate seal of the municipality, were sufficient.—The plaintiff held an exclusive license for a ferry. Another ferry was operated within the plaintiff's territory by an unincorporated association of persons, which issued tickets to its members to the amount of their respective "shares" in the association:—*Held*, that this latter ferry was not a private ferry, and that the plaintiff's right was thereby infringed. *Humberstone v. Dinner*, 2 Terr. L. R. 106. Affirmed, 26 S. C. R. 252, 16 Occ. N. 258.

**4. House of Commons—Representation of Provinces—B. N. A. Act, 1867, s. 51—Aggregate population of Canada.]**—In determining the number of representatives to which Ontario, Nova Scotia, and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in s.s. 4 of s. 51 of the B. N. A. Act, 1867, mean the whole population of Canada, including that of Provinces which have been admitted subsequent to the passing of the Act. Prince Edward Island on admission to the union became subject to the provisions of s. 51, and its representation is liable to be readjusted thereunder after each census. *In re Representation in House of Commons*, 23 Occ. N. 209, 33 S. C. R. 475, 594.

**5. Incorporation of company—**"Works for the general benefit of Canada"—*Preamble—Expropriation of land.*—A company was incorporated by a Dominion statute, which recited that "it is desirable for the general advantage of Canada that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland rivers, with the object of promoting manufacturing industries and inducing the establishment of manufacturing in Canada, and other businesses," and that the contemplated works would interfere with the navigation of the Welland river. The Act then expressly authorized the construction of certain works and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts extending beyond the limits of the Province. The Act was subse-

quently amended by the Dominion Parliament, and recognized by the Legislature of Ontario: — *Held*, that the preamble shewed by implication the intention of Parliament to give the power to deal with public property of the Dominion and to expropriate private property in the Province, and the reason for doing so; and was a Parliamentary declaration that the formation of the company for the purposes mentioned was for "the general advantage of Canada." *In re Ontario Power Co. of Niagara Falls and Henson*, 23 Occ. N. 227, 6 O. L. R. 11.

**6. Incorporation of railway company by Provincial statute** — *Work for general advantage of Canada* — *Declaration of, by Dominion statute* — *Application of Provincial Crown Franchises Regulation Act.* — The defendants were originally incorporated in 1897 by a Provincial Act. In 1898 by a Dominion Act their objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act: — *Held*, setting aside an order allowing the Provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the company. *Attorney-General for British Columbia v. Vancouver, Victoria, and Eastern R. W. and Navigation Co.*, 9 Brit. Col. L. R. 338.

**7. Indian lands** — *Surrender* — *Proprietary right* — *Power of disposition* — *B. N. A. Act, s. 91* — *Leave to appeal.* — Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the Province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers and under the seal of the Province. *St. Catharines Milling Co. v. The Queen*, 14 App. Cas. 46, followed. The Dominion Government having purported, without the consent of the Province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty: — *Held*, that this was *ultra vires* the Dominion, which had, by s. 91 of the British North America Act, exclusive legislative authority over the lands in question, but had no proprietary rights therein. The consent of the Province having been subsequently provided for by a statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had

been made. Judgment in 32 S. C. R. 1 affirmed. *Ontario Mining Co. v. Seybold*, [1903] A. C. 73.

**8. Interest** — *Rate of* — *Mortgage* — *Redemption* — *British company lending money in Canada* — *Contract* — *Application of law of Canada* — *Tender of mortgage money* — *Agents in Canada* — *Bill of exchange.* — In an action to compel the defendants, mortgagees in Great Britain, to accept the principal money and interest due on a ten-year mortgage, which had run for six and one-half years, under the provision of R. S. C. c. 127, s. 7, in which it was contended that that section was *ultra vires* of the Dominion Parliament, and that the tender was not made to the proper agents: — *Held*, that the section was *intra vires* of the Dominion Parliament, and it was not restricted in its application to such mortgages as are mentioned in s. 3 of the Act, but applies to every mortgage on real estate executed after the 1st July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage." — 2. That the words of s. 25 of R. S. O. 1897 c. 205 are wide enough to apply to mortgages executed prior to the passing of that Act. — 3. That the defendants' Imperial Act of incorporation gave them the right to lend money in Canada in the same way as an individual could do, but gave them no higher or other rights. — 4. That the loan being made, the property situated, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its incidents. — 5. That the agency of the persons to whom the tender was made was established, and that the tender of a bill of exchange was sufficient under the terms of the mortgage. *Bradburn v. Edinburgh Life Assurance Co.*, 23 Occ. N. 199, 5 O. L. R. 657.

**9. Liquor Act of Ontario, 1902** — *Intra vires* — *Voting on by electors* — *Delegation of legislative power* — *Corrupt practices* — *Appointment of Judge to conduct trial.* — The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws. — *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. 348, and *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A. C. 73, followed. — The Legislature, in enacting the Liquor Act, did not exceed, or fail to properly exercise, its powers. — Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them. — *Russell v.*

*The Queen*, 7 App. Cas. 829, *The Queen v. Burah*, 3 App. Cas. 889, and *City of Fredericton v. The Queen*, 3 S. C. R. 505, followed. —By s. 91 (4), providing that the President of the High Court shall designate a County or District Judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under part I., the Legislature did not assume the power of appointing Judges, and did not exceed its powers in providing that a County or District Judge designated should exercise jurisdiction outside of his own county or district; and a Judge so designated may try the accused without a jury. *Rea v. Carlisle*, 23 Occ. N. 321, 6 O. L. R. 718.

### 10. Liquor Act of Ontario, 1902

— *Referendum — Power of Legislature — Trial of offenders — Constitution of Court*—“*To conduct the trial*”—*County Judge—Issue of summons—Adjournment for sentence.*—On a motion to quash a conviction for attempting to put a paper other than a ballot paper authorized by law into a ballot box, contrary to the provisions of s. 191 of the Ontario Election Act and s. 91 of the Liquor Act, 1902.—*Held*, that the reference by the Legislature of such a question as that mentioned in s. 2 of the Liquor Act, 1902, to the vote of electors, instead of the Legislature itself deciding it, is unusual but well within the powers of the Legislature.—*Held*, also, that the intention of the Legislature under s.s. 4 of s. 91 was to create a tribunal with authority to try certain specific offences; that the Court so created had power under the words “to conduct the trial” to bring the party charged before the Court, try him for the offence, and sentence him if found guilty; that the County Judge appointed to conduct the trial does not act as a County Judge but as a Court specially created; that it was intended that he should act out of his own county in holding the actual trial; that he may issue his summons in his own county or elsewhere; and has power, after finding the accused guilty, to adjourn the Court to a subsequent day for the purpose of passing sentence.—Section 191 of R. S. O. 1897 c. 9 is wide enough not only to meet the case of an offending returning officer or deputy returning officer, but that of any other person. *Rea v. Walsh*, 23 Occ. N. 186, 5 O. L. R. 527.

### 11. Telegraph companies—Tax on

—*Application to interprovincial company—Action to recover tax—Parties—Collector of revenue — Attorney-General — Intervention — Appeal — Formal objections not taken below.*—The statute of the Legislature of Quebec imposing an annual tax of \$2,000 upon every telegraph

company having a paid-up capital exceeding \$50,000, and maintaining a line of telegraph for the use of the public in the Province, is *intra vires* of the Legislature.—2. The appellant telegraph company, although incorporated by Parliament and carrying on an interprovincial line of telegraph, that is to say, in all the Provinces of Canada, except British Columbia and Prince Edward Island, having a paid-up capital exceeding \$50,000, must pay this annual tax of \$2,000, inasmuch as it carries on business in the Province of Quebec by reason of its there using a part of its lines for messages from one point to another within the Province.—3. An action brought by a collector of revenue in that capacity for the recovery of this tax is to be regarded as brought under the direction of the Attorney-General, who is *dominus litis*, and therefore the intervention of the Attorney-General to sustain the constitutionality of the statute, is an unnecessary and useless proceeding, for which he could not, under the circumstances, be allowed costs.—4. The Court of Appeal will not take into consideration objections which have regard rather to the form than to the substance, if they have not been taken in the Court below. *Great North Western Telegraph Co. v. Fortier*, Q. R. 12 K. B. 405.

12. Telephone company—Work or undertaking connecting Provinces—Jurisdiction of Dominion Parliament—Right to construct lines in streets.—The work or undertaking for the prosecution of which the defendants were incorporated by 43 V. c. 7 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces, or extending beyond the limits of the Province, within the meaning of the exception *a.* in clause 10 of s. 92 of the British North America Act, and therefore falls within the exclusive legislative authority of the Parliament of Canada, under clause 2 of s. 91.—The powers conferred by the defendants' Act of incorporation, as amended by 45 V. c. 95 (D.), are not curtailed by the provisions of 45 V. c. 71 (O.), as regards the right to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisions set forth and contained in s. 3 of the Act of incorporation as amended; MacLennan, J.A., dissenting.—*Judgment of Street, J.*, 3 O. L. R. 465, 22 Occ. N. 142, reversed. *City of Toronto v. Bell Telephone Co. of Canada*, 23 Occ. N. 277, 6 O. L. R. 335.

See CROWN, I. 2—PRIVY COUNCIL, 1—REVENUE, 3.

## CONTEMPT OF COURT.

**1. Habeas corpus — Disobedience—Peace officer — Return.]**—A peace officer upon whom a writ of *habeas corpus* has been served, directing him to produce a prisoner who is in his custody, is not guilty of contempt of Court in neglecting to produce the prisoner, when, in good faith and for reasons which he believes to be valid, he does not do so.—**2. A return setting forth all these reasons is sufficient return to such a writ.** *Greene v. Carpenter*, Q. R. 22 S. C. 104.

**2. Husband and wife—Wife leaving conjugal domicile—Disobedience to judgment.]**—A wife who has been ordered by a judgment to return to the conjugal domicile, and who leaves it after having returned to it cannot for so doing be imprisoned for contempt of Court. *Tessier dit Laplante v. Guay*, Q. R. 23 S. C. 75.

**3. Motion to stay appeal by defendants in contempt—Disobedience to injunction—Unincorporated association—Service—Costs.]**—On a motion by the plaintiff to stay a pending appeal by the defendants from an order dismissing an application to set aside service of the writ of summons on an individual for the defendant association, on the ground that the association was not an incorporated body or a partnership and could not be served as a body, the plaintiff alleging that the defendants were in contempt for disobedience of an injunction:—**Held**, following *Metallic Roofing Co. of Canada v. Local Union No. 50, Amalgamated Sheet Metal Workers' International Assn.*, 23 Occ. N. 152, 5 O. L. R. 424, that the association was not a body capable of being sued or being served, and so was not capable of being enjoined or of committing a contempt, and that, as the very object of the appeal was to determine whether it could be sued and served with process, it could not be determined whether a contempt had been committed without hearing the appeal:—**Held**, also, that the rule is not universal that persons guilty of contempt can take no step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself, and, as the defendants here were ordered to appear within ten days on pain of having judgment signed against them, they had the right to shew, if they could, that the service upon them was not permitted by the practice; and the motion was refused under the circumstances without costs. *Fry v. Ernest*, 9 Jur. N. S. 1151, and *Ferguson v. County of Elgin*, 15 P. R. 399, followed. *Small v. American Federation of Musicians*, 23 Occ. N. 188, 5 O. L. R. 456.

**4. Newspaper comment — Conduct of revising officer.]**—The publication of newspaper articles reflecting on the conduct of a revising officer acting under the Election Act in such a way that they might have been made the subject of proceedings for libel, but not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, does not constitute a contempt of Court punishable by summary proceedings. *Skipworth's Case*, L. R. 9 Q. B. at p. 233, *Hunt v. Clarke*, 58 L. J. Q. B. 490, and *The Queen v. Payne*, [1896] 1 Q. B. 577, followed. *In re Bonnar*, 23 Occ. N. 269; *Re v. Bonnar*, 14 Man. L. R. 481.

**5. Order for imprisonment—Appeal — Discretion.]**—Where the trial Judge has exercised his discretionary powers in a matter of procedure, by ordering that a party who was in contempt of Court for refusing to produce effects unlawfully removed by her, should be imprisoned until the effects should be produced, the Court of King's Bench, or a Judge thereof, will not be disposed to allow an appeal from such exercise of discretion, and particularly where the course adopted by the Court below was apparently the only practical remedy available to enforce obedience to its orders. *St. Pierre v. Belisle*, Q. R. 12 K. B. 279.

**6. Pending criminal proceeding—Information — Contemptuous design.]**—The question whether a contempt has been committed is for the sole decision of the Court; and the fact that the contemnor denies any disrespectful or contemptuous design to reflect on proceedings pending before the Court, will not justify him if such comments appear to the Court to amount to a flagrant contempt.—**2. Proceedings are pending in a criminal case from the time the information has been laid, and so long as any proceedings can be taken.** Where the jury have disagreed and a new trial has been ordered, the cause is pending until ended by a verdict or otherwise. *Re v. Charlier*, Q. R. 12 K. B. 385.

## CONTRACT.

- I. BUILDING CONTRACT.
- II. CONSTRUCTION.
- III. ILLEGALITY.
- IV. MAKING THE CONTRACT.
- V. NOVATION.
- VI. RESCISSION.
- VII. STATUTE OF FRAUDS.
- VIII. OTHER CASES.

See ARBITRATION AND AWARD—ATTACHMENT OF DEBTS, II. 1—BANKS AND BANKING, 3 — BROKER — CARRIERS — CHAMPERTY — CONSTITUTIONAL LAW, 8 — CONVERSION — COVENANT IN RESTRAINT OF TRADE—CROWN, III. 1, 2—DAMAGES, 1—EASEMENT—EVIDENCE, I. 2, III.—FRAUD AND MISREPRESENTATION—HUSBAND AND WIFE, IX. 5—INFANT, 2, 6—INJUNCTION, 1—INSURANCE — INTEREST — JUDGMENT, III. — LANDLORD AND TENANT—MASTER AND SERVANT, II. 1, III. 2—MECHANICS' LIENS—MUNICIPAL CORPORATIONS, III., X. 1, XIV. 2—OPPOSITION, 8 — PARTICULARS, 3 — PARTIES, 4, 9—PARTNERSHIP—PEREMPTION, 8—PILOTS, 1—PLEADING, VIII. 2—PRINCIPAL AND AGENT—REVENUE, 4—SALE OF GOODS, III.—SHIP, I. 1—SPECIFIC PERFORMANCE—STREET RAILWAYS, 1—TRADE UNION, 2—TRIAL, II. 4—VENDOR AND PURCHASER—WAX, I. 3.

### I. BUILDING CONTRACT.

**Extras—Certificate of architect.]**—The certificate for additional work given by the architect of the owner after the completion of the work will avail, instead of the authorization in writing of the owner required by Art. 1690, C. C. *Bayard v. Drouin*, Q. R. 22 S. C. 420.

### II. CONSTRUCTION.

**1. Municipal works—Specifications** —“From” and “to” streets—Plan.]—The words “from” and “to” streets mentioned in specifications for the construction of works undertaken by an agreement in writing, as shewn on a plan annexed to and declared to form part of the contract, are not necessarily exclusive. Where the agreement provided that the works should be constructed “along Notre-Dame street from Berri street to Lacroix street as shewn on the said plan,” these words mean, “as far as the plan shews along Notre-Dame street, but not exceeding the most distant side of Lacroix street.” *City of Montreal v. Canadian Pacific R. W. Co.*, 33 S. C. R. 396.

**2. Supply of electric power—Continued existence of property—Condition precedent.]**—Where, under the terms of an agreement, the plaintiffs were to supply the defendants with electric current to a specified amount of horse power, to be used by them for operating their machinery, and for use in their business, and for no other purpose, the limitation was held to be for the purpose of confining the use of the power to the defend-

ants' premises, and not to any existing mill thereon, so that the fact of such mill being afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power.—*Taylor v. Caldwell*, 3 B. & S. 826, distinguished. *Ontario Electric Light and Power Co. v. Baxter and Galloway Co.*, 23 Occ. N. 152, 5 O. L. R. 419.

### III. ILLEGALITY.

**1. Lottery—Recovery back of moneys paid—Statute.]**—The respondent, having obtained from the Lieutenant-Governor of the Province of Quebec, authorized to that effect by a statute of the Legislature, the privilege of carrying on a lottery to assist a work recognized by the Legislature as being a laudable and useful public work, delegated his powers to the appellant, on the condition that the latter should pay him \$5,000 per year. The appellant carried on the lottery for two years, realizing considerable profits, and during this time paid the respondent \$10,000. The carrying on of the lottery having been declared illegal, the appellant sued to recover back the \$10,000 which he had paid to the respondent. Both parties admitted the unconstitutionality of the statute by virtue of which the lottery had been authorized:—*Held*, that the payment in question having been made voluntarily and not by mistake by the appellant, who had made considerable profits by virtue of his contract with the respondent, the appellant, who alleged the illegality of the contract, could not, the contract having been executed on both sides in good faith, recover the sums which he had so paid. *Brault v. L'Association St. Jean Baptiste*, Q. R. 12 K. B. 124.

**2. Threshing wheat—Weights and Measures Act—Burden of proof—Voluntary payment—Appropriation of payments—Appeal—Question of fact.]**—The chief part of the plaintiff's claim was for the price of threshing oats and wheat for the defendant, and the defence was that the quantities were ascertained in a manner prohibited by the Weights and Measures Act, R. S. C. c. 104, and that therefore the plaintiff could not recover.—It appeared from the evidence that the oats threshed had been measured by the bag, but it also appeared from a statement rendered to plaintiff by defendant that he had credited the plaintiff with the amount of his account for threshing the oats, and charged the plaintiff with certain items dated prior to any other credit to the plaintiff and amounting to about the same as the price of threshing the oats:—*Held*, following the rule in

*Clayton's Case*, 1 Mer. 610, that the defendant had appropriated the amount of his charges in settlement of the price of threshing the oats, and, following *Hughes v. Chambers*, 14 Man. L. R. 163, 22 Occ. N. 333, that he could not now set off such amount against the price of threshing the wheat.—As to the threshing of the wheat, the bargain was that the defendant was to pay by car measurement if it was clean, if not, then by bag measurement, neither of which modes would be legal under the statute; but the defendant in the statement rendered to the plaintiff had credited him with the threshing of 4,597.20 bushels of wheat at 5¼ cents per bushel. The defendant gave no evidence, and there was no express testimony that the wheat had been measured by the bag, but the trial Judge held that the proper inference was that the measurement had been by the bag, and he dismissed the plaintiff's claim:—*Held*, following *Hanbury v. Chambers*, 10 Man. L. R. 167, 14 Occ. N. 321, that the trial Judge was not bound to draw such inference in a case where it would enable the defendant to evade payment of an honest claim; that, as there was no conflict of testimony, the appellate Judge was free to follow his own views as to the conclusions to be drawn from the evidence; that the defence raised should not prevail without strict proof of a violation of the Act; and that there was no such proof in this case. *Fox v. Allen*, 23 Occ. N. 28, 14 Man. L. R. 358.

#### IV. MAKING THE CONTRACT.

**1. Agent—Ratification.**—A contract made by an agent is complete before he has advised his principal of it, and before the latter has sent a ratification to the other party to the contract. *Hibbard v. Thompson Co.*, 5 Q. P. R. 372.

**2. Hiring—Breach—Cause of action where arising—Contract made outside of Province—Jurisdiction.**—In an action for damages for breach of an agreement of hiring, the contract itself and its conditions are material facts which must be proved by the plaintiff; therefore, if the contract was made outside of the Province of Quebec, it cannot be said that the whole cause of action arose in the Province. *Landry v. Hurdman*, 5 Q. P. R. 273.

**3. Place of making—Cause of action—Jurisdiction.**—An action to recover a sum of money paid to his principal by an agent for the sale of goods on commission, in excess of what is due, cannot be brought at the place in this Province where the money so paid was

deposited to be transmitted by the bank, if the contract between the parties was not entered into at the same place, but in another Province. *Hamel v. Stapleton*, 5 Q. P. R. 247.

**4. Place of making—Correspondence—Superior Court—Territorial jurisdiction.**—A contract by correspondence is made at the place where the acceptance is sent, by letter or telegram, to the party making the offer. *Schmidt v. Crowe*, 5 Q. P. R. 361.

**5. Place of making—Purchase of goods—Superior Court—Territorial jurisdiction.**—A contract made by telephone for the purchase of goods to be forwarded by the vendor, at the expense and risk of the purchaser, is not regarded as having been made at the place from which the goods are sent.—2. The receipt by the vendor of letters confirming the purchases made by telephone is not sufficient to give jurisdiction to the Court of the district in which these letters are received and from which the goods bought have been sent. *Walker v. Gervais*, 5 Q. P. R. 330.

**6. Place of making—Sale of goods—Circuit Court—Territorial jurisdiction.**—Where an order is given to a travelling salesman to have sent by a carrier goods which are at the warehouse of the vendor and are afterwards delivered to the traveller to be forwarded to the purchaser, the contract is made at the place from which the goods are forwarded, and the Court of the district in which that place is situated has jurisdiction in an action for the price of goods so sold and delivered. *Gravel v. Gendreau*, 5 Q. P. R. 360.

**7. Purchase of goods—Correspondence—Acceptance—New terms.**—On the 2nd October, O. handed the company's purchasing agent the following letter:—"I can offer you thirty cars of timothy hay at \$10.50 per ton on cars at Chewelah, subject to acceptance in five days, delivery within six months. P.S.—I also agree to furnish seven cars of timothy hay at \$10 per ton if above offer for 30 cars is accepted." On the 5th October the company mailed to O. an answer as follows:—"We would now inform you that we will accept your offer on timothy hay as per your letter to us of the second instant. Please ship as soon as possible the orders you already have in hand, and also get off the seven cars at \$10 as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to the shipment of the 30 cars. Should we not be able to

take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was received by O. on the 8th October:—*Held, per* McColl, C.J., and Martin, J., that the company's reply was not a complete acceptance. *Per* Walkem and Irving, J.J., that it was a complete acceptance. *Oppenheimer v. Brackman and Ker Milling Co.*, 9 Brit. Col. L. R. 343.

See WRIT OF SUMMONS, I. 3, 11.

## V. NOVATION.

**Substitution of third party — Relief over.**—A party, who is bound under a condition which has not been fulfilled, and whose obligations have been assumed by a third party accepted by the plaintiff, cannot, if he is sued for non-execution of the contract which he has thus transferred, bring in *en garant* the third person who has been substituted for him. *Veilleux v. Atlantic and Lake Superior R. W. Co.*, 5 Q. P. R. 290.

## VI. RESCISSION.

**1. Cancellation in part—Construction—Municipal works—Deductions—Deferred payments—Interest—Payments in advance—Rebates—Damages.**—Article 1691, C. C., does not give the owner of works being constructed under a contract at a fixed price the power of cancelling the contract in part and maintaining it as to another part; it must be cancelled *in toto* or not at all.—A municipality agreed to pay for works by promissory notes, payable in two years without interest, to be delivered to the contractor on the completion of the works, and to bear a date assumed to be the mesme date of completion of the works as carried on in detail. The mesme date was settled as 15th December, 1899, and the notes for the balance due were delivered in 1900:—*Held*, that interest on advance payments made before 15th December, 1899, was payable only from that date; but the interest should be calculated on the basis of the actual amounts of the advance payments made, and not on the basis of the actual cost of the works. Certain of the works were not executed by orders from the municipality, and on this head a reduction was made from the plaintiffs' claim. It appeared that the plaintiffs had, at least tacitly, consented to this diminution, and made no protest in re-

spect thereof:—*Held*, that, under the circumstances, the plaintiffs could not claim the sum in question as damages under Arts. 1065, 1691, C.C. *Town of Maisonneuve v. Banque Provinciale du Canada*, 33 S. C. R. 418.

**2. Threats — Apprehension.**—In order that a father may have the right to rescind a contract which he has made, on the ground of threats to his daughter, it is necessary that these threats shall have produced an apprehension in him which is the sole reason of his consenting to execute the contract. The apprehension of his daughter, if he himself did not share it, has no effect upon the contract. *Giroux v. Vinet*, Q. R. 24 S. C. 1.

## VII. STATUTE OF FRAUDS.

**1. Failure to state terms—Nudum pactum — Conditions — Impossibility of performance.**—The plaintiff, having recovered judgment for \$542.50 against O'B., issued a garnishee order against the defendant, and an issue having been ordered, the trial Judge held that the agreements between O'B. and the defendant, by virtue whereof the alleged indebtedness arose, did not comply with the Statute of Frauds, inasmuch as the parties had omitted to state therein the terms actually agreed upon, and decided the issue in favour of the defendant:—*Held*, on appeal, that the promise made by the defendant and now sought to be enforced against him was *nudum pactum*. —2. That O'B. and the defendant in reality came to an agreement in ignorance of the fact that its performance, in view of the conditions it was contingent upon, was impossible. *Manley v. Mackintosh*, 10 Brit. Col. L. R. 84.

**2. Promise to become answerable for debt of another—Form of action—Pleading.**—In an action against the defendants M. and G. for work done and materials provided by the plaintiff for the defendants, at the defendants' request, the evidence shewed that the defendant G. entered into a contract with the defendant M. for the building of a house, and that the defendant M. employed the plaintiff to do the work of painting and glazing. M. failed to make payments to the plaintiff as agreed, and the plaintiff thereupon went to G., who told him to go ahead and he would see him paid:—*Held*, that, as there was no evidence to shew that the defendant M. was to be discharged, the promise made by the defendant G. was within s. 4 of the Statute of Frauds, and, not having been made in writing, could not be enforced:—*Held*, that, in view of the form of action,



there was no necessity for pleading the statute, and that judgment was rightly given in favour of the defendant *G. Boorstein v. Moffatt*, 36 N. S. Reps. 81.

## VIII. OTHER CASES.

**1. Sale of monument — Sample—Evidence.**—In an action for the price of a tombstone, the defence was that it was not of the design ordered. It had been ordered from photographic samples, and an order form was filed in, which, when produced at the trial, contained the words "E. M. Lewis Reporter Design," which the defendant asserted were not in it when it was signed by him, but which were there two or three hours later when handed to one of the vendors by their foreman who had taken the order and filled in the form. The evidence at the trial was conflicting, and the Chancellor, trying the case without a jury, dismissed the action. His judgment was reversed by the Court of Appeal (1 O. W. R. 602): — *Held, per TASCHEREAU, C.J.*, that the evidence established that the words in dispute were in the order when it was signed, and the plaintiffs were entitled to recover: — *Held, per SEDGWICK and DAVIES, J.J., MILLS, J., hesitante*, that, even if these words were not originally in the order, the circumstances disclosed in evidence shewed that the design supplied was substantially that ordered; and the judgment appealed from should stand. *Lewis v. Dempster*, 23 Occ. N. 179, 33 S. C. R. 292.

**2. Seal — Undisclosed principal — Partnership — Amendment.**—P. sold mining areas, and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company, which received a deed of the land and did some work, but finally ceased operations. Only a small part of the stock was sold, and none was given to P., who brought an action against the purchaser, H., in which he alleged that the latter was a partner of the purchaser and that the agreement was signed on behalf of both. The purchaser did not defend the action: — *Held*, that no action could lie against H. on the agreement under seal not signed by him, even if it was for his benefit and a seal was not necessary.—The Court refused to interfere with the discretion of the Court below in refusing an amendment to the statement of claim. *Porter v. Pelton*, 23 Occ. N. 213, 33 S. C. R. 449.

**3. Services by near relatives—Implied right to remuneration—Presumption.**—The presumption against an implied right to remuneration for services rendered by near relatives arises only when the persons rendering the services, and those to whom they are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may in the case of near relatives be negatived on very slight grounds.—The Court held on the facts in this case that the plaintiff, a married woman who left her own home to nurse her sister, was not entitled to remuneration for her services. *Mooney v. Grout*, 23 Occ. N. 327, 6 O. L. R. 521.

**4. Work and labour—Warranty — Heating of building — Construction — Judge's charge—Condition precedent—Allowance for defects—Admissions—Mistake—Substantial performance—Waiver—Quantum meruit.**—Action to recover the contract price of putting a hot water heating apparatus into a building for the defendant. The contract provided "as the essence," that "the heating of the entire building shall, easily and without forcing the boilers, maintain throughout the building a temperature of not less than 65 degrees Fahrenheit in the most severe cold." The trial Judge charged the jury (*inter alia*) that the contractors were bound to supply a system which would easily maintain 65 degrees without forcing the boilers; that they were bound to put in a radiating surface to the percentage named in the contract in any event, and if a greater surface was necessary, in order to produce the 65 degrees, they were bound to furnish it; that the maintenance of the 65 degrees was necessary to entitle the plaintiffs to recover; that if the jury found that the system was not capable of maintaining the required temperature, they must find for the defendant, and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature; that the defendant was not bound by an admission in a letter as to the amount due by him, so long as the plaintiffs had not altered their position by reason of the admission, and the defendant was not precluded from shewing that the admission was a mistake. The jury found a verdict for the defendant: — *Held*, that there had been no misdirection. The questions of the "substantial performance" of a contract and of the waiver of a special contract and the substitution of a new contract to pay according to a *quantum meruit*, discussed. *Toronto Radiator Mfg. Co. v. Alexander*, 2 Terr. L. R. 120.

**CONTRAINTE PAR CORPS.**

See ARREST, III. 7, 8, 9.

**CONTRIBUTION.**

See INSURANCE, IV.

**CONTRIBUTORIES.**

See COMPANY, II. 4.

**CONTROVERTED ELECTIONS.**

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS.

**CONVERSION.**

**1. Purchase of goods — False pretences of supposed agent of purchaser—Contract—Consensus.]—H.** fraudulently represented to the plaintiffs that he was the agent of the defendants sent by them to make a purchase of goods. He was not, in fact, in the defendants' employment; they did not send him to make the purchase, nor did they know he was going to make it; but, on the contrary, after he had so fraudulently obtained the goods, they purchased the goods from him and paid him in full, without knowing where he had purchased. The goods were afterwards sold by the defendants in the ordinary course of their business:—*Held*, that the property in the goods did not pass to the defendants, and they were liable to the plaintiffs for conversion. *Cundy v. Lindsay*, 3 App. Cas. 459, applied. There was no contract between the plaintiffs and defendants—no *consensus ad idem*—and no contract between the plaintiffs and H. *Eby-Blain Co. v. Frankel*, 23 Occ. N. 173.

See BANKS AND BANKING, 1—CARRIERS, 3—CRIMINAL LAW, II. 14—PLEADING, IX. 1.

**CONVICTION.**

See APPEAL, I. — CANADA TEMPERANCE ACT — CERTIORARI—CRIMINAL LAW — JUSTICE OF THE PEACE—LIQUOR ACT OF ONTARIO—LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, I. 1, 3, VI. 2, XV., XVI. 5—REVENUE, 3—SUNDAY.

**COPYRIGHT.**

**1. Book—Absence of registration—Pirating—Injunction—Change of title.]—The author of a work not protected by registration as provided by law has no exclusive right of republication; and is not entitled to an injunction to restrain the republication and sale of the work by another without the author's consent, or to recover damages for such republication.—2. The fact that in republishing the work the title was changed to one which was disagreeable to the author and wounded his susceptibilities, does not give him the right to restrain the sale of such republication,—particularly where both the original work and the republication appeared under a pseudonym and it was not proved that the author was known to the public under such pseudonym. *Angers v. Leprohon*, Q. B. 22 S. C. 170.**

**2. Book — Foreign reprints—Notice to English Commissioners of Customs—Entry at Stationers' Hall — Evidence—Imperial Acts—License — Registration.]—Section 152 of the Imperial Customs Law Consolidation Act, 1876, requiring notice to be given to the Commissioners of Customs of copyright and of the date of its expiration, is not in force in this country, notwithstanding the expression of opinion in part IV. of the appendix to R. S. O. 1897, vol. 3.—*Held*, that the plaintiffs had established their right to an injunction perpetually restraining the defendants from importing into Canada any copies of the 9th ed. of the *Encyclopædia Britannica*, and for delivery up of imported copies for cancellation, and for an account. *Semble*, that if in a notice to the Commissioners a wrong date is given as that of the expiry of the copyright, it will invalidate the notice. A certified copy of the entry at Stationers' Hall is *prima facie* evidence of proprietorship of copyright of an *encyclopædia* under ss. 18 and 19 of the Imperial Copyright Act of 1842, and it is not necessary for such *prima facie* case to prove the facts which by those two sections are made conditions precedent to the vesting of the copyright in one who is not the author.—The plaintiffs, by agreement in writing, in consideration of a large sum of money, gave certain other persons the exclusive right to print and sell the edition of the work in question at not less than certain fixed prices, for the remainder of the duration of their copyright except the last four years thereof, and delivered over to them the plates used in printing, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and agreed not to announce the publication of another edition before such last men-**

tioned period, but expressly reserved the copyright to themselves:—*Held*, that the agreement was a license and not an assignment, and so did not require registration under s. 19 of 5 & 6 V. c. 45 (Imp.) *Black v. Imperial Book Co.*, 23 Occ. N. 68, 5 O. L. R. 184.

**3. Book — Infringement — Counterfeit—Prescription — Damages — Profits — Costs—Witness fees.]**—The infringement of copyright duly registered, by the publication of a counterfeit book of a similar character, largely composed of material taken from the copyrighted work, and the sale of copies thereof, constitutes an offence successive and continuous, and the short prescription of Art. 2261, C. C., does not apply.—2. The owner of the copyright is entitled, by way of damages, to all the profits realized by the counterfeiter on the sale of counterfeit copies, and also to the costs of expert witnesses who were engaged to establish infringement. *Beauchemin v. Cadieux*, Q. R. 22 S. C. 482.

**4. Musical compositions—Authorship — Infringement — Pleading — Assignment—Notice.]**—A company alleging that they are the registered owners and proprietors of certain Canadian copyrights, covering certain musical compositions, may answer allegations that they are not the authors, or legal representative of the authors, of the musical compositions, by saying that the British proprietors of the copyrights assigned the same to them, and that they gave legal notice of such assignment to the Minister of Agriculture before registration in Canada. *Anglo-Canadian Music Publishing Assn. v. Dupuis*, 5 Q. P. R. 351.

**5. Newspaper — Infringement — “First publication.”]**—A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published, or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 & 6 V. c. 45 requiring first publication in the United Kingdom to entitle the publishers to British copyright. *Grossman v. Canada Cycle Co.*, 23 Occ. N. 48, 5 O. L. R. 55.

**6. Works of fine art — Imperial statute.]**—The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British do-

minions outside the United Kingdom. *Tuoh & Sons v. Priester*, 19 Q. B. D. 629, approved. There is nothing in the Canadian Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view. Judgment in 22 Occ. N. 172, 3 O. L. R. 697, affirmed. *Graves v. Gorrie*, [1903] A. C. 496.

## CORRUPT PRACTICES.

See CONSTITUTIONAL LAW, 9 — LIQUOR ACT OF ONTARIO — MUNICIPAL ELECTIONS, 5 — PARLIAMENTARY ELECTIONS, III.

## COSTS.

- I. GENERALLY—RIGHT TO COSTS.
- II. COUNSEL FEES.
- III. DISTRACTION.
- IV. INTERLOCUTORY COSTS.
- V. LIABILITY FOR COSTS.
- VI. SCALE AND QUANTUM OF COSTS.
- VII. SECURITY FOR COSTS.
- VIII. TAXATION.
- IX. WITNESS FEES.

See ACTION—APPEAL, II. 2, 4, VI. 1, 3, VII. 2—ASSESSMENT AND TAXES, II. 2—ATTACHMENT OF DEBTS, II. 4, 7, 9—BANKS AND BANKING, 1, 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, 4—CERTIORARI, 5—CHAMPERTY—COMPANY, III. 1, 9 — CONTEMPT OF COURT, 3—COPYRIGHT, 3—CRIMINAL LAW, IV. 3—DEFAMATION, I. 3—DISCOVERY, I. 5—HUSBAND AND WIFE, III. 1, IV. 1—INJUNCTION, 7, 8—JUDGMENT, II. 1, IV. 1, 2, 3—LANDLORD AND TENANT, VI. 3—LIMITATION OF ACTIONS, II. 4—LIQUOR ACT OF ONTARIO, 3—LIQUOR LICENSE ACT, V. — LUNATIC, 1—MASTER AND SERVANT, II. 10 — MECHANICS’ LIENS, 3—MISTAKE—MORTGAGE, 2, 3—MUNICIPAL CORPORATIONS, VI. 1, VII. 4, VIII. 1, XV. 2, 3—MUNICIPAL ELECTIONS, 7, 8 — OPOSITION, 11—PARLIAMENTARY ELECTIONS, II. 2, 3, 4, 13—PARTITION, 4 — PLEADING, IX. 1, 2—REGISTRY LAWS, 2—REVENUE, 5—SOLICITOR — TRIAL, II. 8 — WATER AND WATERCOURSES, 4—WRIT OF SUMMONS, I. 6, 7.

- I. GENERALLY—RIGHT TO COSTS.

**1. Attorney’s fees — Discretion.]**—The fee to be allowed attorneys upon questions of law submitted to the Court

under Art. 509, C. P., is in the discretion of the Court. *Paré v. County of Shefford*, Q. R. 24 S. C. 50.

**2. Depriving successful party—Conduct—Acquiescence—Custom.]**—In an action for damages for an alleged interference with a fishing berth, judgment was given in favour of the defendant, but he was deprived of costs, it appearing that both the defendant and plaintiff acted throughout as if they thought the fishing berth in controversy was in Lunenburg county; that it had, up to the time of action, been under the charge and control of Lunenburg officers; that the defendant attempted to take it up according to the custom of fishermen followed in that county; that he attended before the fishery officers of that county when they attempted to settle the dispute between himself and the plaintiff, and did not question their jurisdiction; and that the defence that the berth was not in Lunenburg but in Queen's county was not pleaded, nor the objection taken until the trial:—*Held*, that this was not a case in which the discretion of the trial Judge should be reviewed.—*Seem*, that the parties were bound by the custom assented to by them and the decision of the fisheries officer. *Selig v. Nowe*, 36 N. S. Reps. 99.

**3. Depriving successful party—Nolle prosequi—Powers of trial Judge.]**—Where a *nolle prosequi* had been entered as to certain defendants before trial, and a verdict was afterwards obtained against the remaining defendant, the trial Judge, under s. 373 of the Supreme Court Act, granted a certificate depriving the first mentioned defendants of their costs:—*Held*, that the certificate was authorized by the section. *Mellon v. Municipality of Kings*, 35 N. B. Reps. 291.

**4. Mise en demeure — Advocate's letter—Presentation of draft—*Lis pendens*.]**—When a debt is payable at the domicile of the debtor, a demand of payment made by an advocate's letter is not a *mise en demeure* sufficient to compel him to pay the costs of it, if he is afterwards sued by his creditor.—2. The presentation at the place of business of the debtor of a bill of exchange drawn by his creditor for the amount of the debt, constitutes a *mise en demeure* sufficient to fix him with the costs of a suit begun against him.—3. A proceeding which has not been entered in Court is not a cause, and cannot be set up in support of a plea of *lis pendens*, if the debtor is afterwards sued for the same cause of action. *Lay v. Cantin*, Q. R. 23 S. C. 405.

See post VIII. 8, 9.

**5. Recovery as damages—Action induced by conduct of defendant.]**—A plaintiff whose action was dismissed because the defendant, whom he sued as a widow, was in fact a married woman, cannot claim from her as damages the costs which he incurred in the action so dismissed, not even where she allowed herself to be known as a widow. *O'Malley v. Ryan*, Q. R. 23 S. C. 417.

**6. Special case in action to recover succession duty — Costs payable by Crown where unsuccessful.]**—In litigation under the Succession Duty Act express power is given to the High Court to deal with the costs thereof; and where, therefore, the trustees of an estate had paid, or were ready to pay, all the duty which could properly be claimed against it, they were held entitled against the Crown to the costs of a special case and an action by the Attorney-General to recover higher duties; but only one set of costs was allowed to the trustees and beneficiaries. *Attorney-General v. Toronto General Trusts Corporation*, 23 Occ. N. 194, 5 O. L. R. 607.

## II. COUNSEL FEES.

**1. Right of action for — Liability of client — Fees paid to solicitor.]**—Counsel in British Columbia have the right to maintain an action for their fees.—Where a solicitor, contrary to his client's expectation, does not pay over to a counsel, fees received from his client, the client is still liable to the counsel. *British Columbia Land and Investment Agency v. Wilson*, 9 Brit. Col. L. R. 412.

**2. Second counsel — Written argument.]**—Where a case is submitted to the Court upon *factum* by the consent of parties, a second counsel fee will not be allowed, even if, at the time the case is mentioned to the Court and consent given to the *factum* being put in, the advocate and counsel were both present and robed. *Société des Artisans Canadiens Français v. Hébert*, 5 Q. P. R. 372.

See post VIII. 2.

## III. DISTRACTION.

**1. Execution — Party to cause — Consent of advocate — Opposition.]**—In order that a party may have execution against the opposite party for his costs, as to which there is a distraction in favour of his advocate, it is necessary

that the consent of the advocate should appear by writing upon the fiat, the writ of execution, and the *procès-verbal* of the seizure.—2. If this consent in writing does not appear as above, the party issuing execution, not being a creditor for these costs, cannot seize in his own name, and therefore an opposition to the seizure based upon this default is well founded and will be maintained. *Martin v. County of Arthabaska*, Q. R. 23 S. C. 297.

**2. Execution — Solicitor — Client's right.]**—When an attorney demands a writ of execution for his costs which are subject to distraction, and signs the præcipe as attorney for the party whom he represents, it will be assumed that he has been paid, and that he thereby authorizes his client to issue execution in his name.—2. If he has so permitted his client to issue the execution in his name, he has no right to contest in his own name an opposition made to a seizure under the execution. *Martin v. County of Arthabaska*, Q. R. 22 S. C. 302.

#### IV. INTERLOCUTORY COSTS.

**Set-off—Solicitor's lien.]**—A defendant is entitled to set off interlocutory costs in the same cause, payable to him by the plaintiff, against the damages and costs recovered against him in the final result of the cause; notwithstanding the plaintiff's attorney's lien, which only attaches on the general result of the action. *Anderson v. Shaw*, 35 N. B. Reps. 280.

#### V. LIABILITY FOR COSTS.

**1. Contestation as to costs—Costs of.]**—A party who prays that the costs of an application be borne by another party, who is under no obligation to him, thereby forcing the latter to appear and contest, will be condemned to pay the costs of such contestation. *Gingras v. Boon*, 6 Q. P. R. 37.

**2. Desistment from action—New action — Partnership — Costs of former action.]**—A plaintiff who has desisted from an action against a single defendant, will not be ordered to pay the costs of that action before beginning a new action based upon the same claim against a commercial partnership of which the original defendant was a member. *St. Laurent v. Doran*, 5 Q. P. R. 449.

**3. Third party—Rule 214 — Discretion — Appeal.]**—Rule 214 gives

power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R. S. O. 1897 c. 51, s. 72. *Russell v. Eddy*, 23 Occ. N. 166, 5 O. L. R. 381.

#### VI. SCALE AND QUANTUM OF COSTS.

**1. Assault—Small verdict — Certificate of trial Judge — Review by Court.]**—The Court has jurisdiction to review the discretion exercised by a Judge in certifying under 60 V. c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court.—Where an action for assault and battery was brought in the Supreme Court, and the jury found a verdict for the plaintiff for only \$35, but the trial Judge granted a certificate under the above section, on the ground that the plaintiff's attorney had reasonable grounds for thinking that the title to land would be brought into question:—*Held*, that a sufficient case had not been made out to induce the Court to interfere. *Cormier v. Boudreau*, 36 N. B. Reps. 6.

**2. Attachment of debts—Amount attached.]**—The costs on an attachment after judgment must be taxed according to the amount sought to be recovered from the garnishee, and do not follow the costs of the principal action. *Latour v. Latour*, 5 Q. P. R. 306.

**3. Attachment of debts—Amount attached.]**—Where a contestation of the declaration of a garnishee is dismissed, the class of action will be fixed by the amount of the judgment which the contestant could have obtained against the garnishee if the declaration had shewn that the latter was indebted to the judgment debtor, and this although a part of such sum was insaisissable. *De Sieyes v. Painchaud*, 5 Q. P. R. 363.

**4. Attachment of debts—Contestation of declaration of garnishee — Amount involved.]**—The fee allowed to a garnishing creditor upon a contestation of the declaration of the garnishee, which has been maintained without the garnishee having replied to it, is the fee applicable to an uncontested action, and not that of a contested action, and is regulated by the sum which the garnishee is ordered to pay. *Ettenberg v. Kelly*, 5 Q. P. R. 428.

**5. Certiorari—Order — Fee on.]**—The costs of advocates or attorneys in a case of certiorari are taxed as in an action of the second class in the Superior Court.—2. No fee is allowed upon a judgment ordering the issue of a certiorari. *Arcand v. Montreal Harbour Commissioners*, 5 Q. P. R. 410.

**6. Company—Removal of liquidator —Appeal.]**—The fees in appeals on a petition to remove a liquidator appointed to a joint stock company are the fees of a second class and not of a first class action. *Stimson v. North-West Cattle Co.*, 5 Q. P. R. 239.

**7. Criminal libel—Criminal Code, s. 835.]—Quere**, where costs are taxable under s. 835 of the Criminal Code, on what scale should they be taxed? *Nichol v. Pooley*, 9 Brit. Col. L. R. 363.

**8. Jurisdiction of County Court —Ascertainment of amount—Action for price of goods—Reduction of claim by trial Judge.]**—In an action in the High Court for \$340, the balance of a \$790 account for logs sold by the plaintiff to the defendant, \$450 of which was paid before action, the trial Judge found that the sale was made as contended by the plaintiff, but reduced the amount by \$20 for some logs not received by the defendant:—*Held*, on an appeal from the ruling of a taxing officer, that the plaintiff was entitled only to County Court costs, and the defendant to a set-off; the sum of \$340 being an ascertained amount, the reduction of it by the trial Judge did not affect the ascertainment. *Brown v. Hose*, 14 P. R. 3, distinguished. *Lovell v. Phillips*, 23 Occ. N. 114, 5 O. L. R. 235.

**9. Lump sum—Injunction motion.]**—The costs of the advocates of the respondent under a judgment dismissing, after hearing, a petition for an injunction, were fixed upon application to the Judge at \$50. *National Typographic Co. v. Dougall*, 5 Q. P. R. 162.

**10. Payment into Court—Inquiry as to creditors' claims—Certificate for County Court costs—Set-off — Discretion.]**—Under 59 V. c. 19, s. 3 (O.), the equitable jurisdiction of the County Courts, which had been taken away by the Law Reform Act of 1868, was restored to that Court, so that it has equitable jurisdiction where the subject matter involved does not exceed \$200.—An action having been brought to set aside an alleged fraudulent conveyance of certain lands to the defendant, a *lis pendens* was registered, and by a consent order was vacated on payment of \$300 into Court, with a provision that

creditors should file their claims. Claims were filed to over \$200, adjudicated upon by the Master, and fixed at \$189.47, the amount found to be due to the plaintiff being \$96.20, for which judgment was given with costs on the lower scale; the Master giving a certificate that his ruling was that the plaintiff was entitled to costs on the County Court scale, without any right of set-off:—*Held*, that the Master's order as to costs should not be interfered with. *Halliday v. Rutherford*, 23 Occ. N. 200.

**11. Petition to set aside injunction order.]**—The costs of an advocate upon a petition to set aside a judgment granting an interlocutory injunction before issue of the writ of summons, not being provided for by the tariff, will, under Art. 12 of the tariff, be taxed upon the scale applicable to analogous proceedings; and a petition to set aside a judgment in an ordinary case is an analogous proceeding. *Ozone Co. of Toronto v. Massicotte*, 5 Q. P. R. 176.

**12. Revendication of insurance policies—Amount involved.]**—In an action of revendication of insurance policies, which represented the face value of over \$200, the costs should be granted according to the actual value of the titles, not according to the value which the titles represented. *Bouchard v. Hétu*, 6 Q. P. R. 44.

**13. Tariff — Interpretation — Class of action.]**—The allowance of costs, being a matter of statutory declaration and not of right, cannot exceed the limits defined by the text of the statute. Therefore subdivision 7 of the second class of the tariff must apply to the allowance of costs in an action for the rescission of a winding-up order and appointment of a liquidator to a company, although financial interests may be involved in the suit, which, if they formed the subject of the conclusions of the action, would bring it within the first class for the purposes of taxation. *Stimson v. North-West Cattle Co.*, Q. R. 12 K. B. 365.

**14. Trespass to land—Value of land—Payment of \$1 into Court—Acceptance by plaintiff.]**—In an action for trespass to land, valued at over \$200, in which the plaintiff claimed \$1,000 damages, and no question of title to land was raised, the defendant paid \$1 into Court, and the plaintiff accepted it:—*Held*, that the plaintiff was entitled to his costs on the High Court scale. *Babcock v. Standish*, 19 P. R. 195, followed. *Chick v. Toronto Electric Light Co.*, 12 P. R. 58, and *Tobin v. Mc-*

*Gillis, ib.* 60 n., commented on. *McKelvey v. Chilman*, 23 Occ. N. 114, 5 O. L. R. 263.

## VII. SECURITY FOR COSTS.

**1. Action against municipal corporation—Non-repair of highway—Personal injuries.]—**Article 793 of the Municipal Code, which requires a person who sues a municipal corporation, of which he is not a ratepayer, on account of non-repair of the roads and pavements of the municipality, to deposit a sum of \$10 with the clerk of the Court at the time of the issue of the writ of summons, as security for costs, applies to actions for damages for injuries caused by non-repair, and not merely to actions for the penalty provided by Art. 793. *Lalonde dit Gascon v. Parish of St. Vincent de Paul*, Q. R. 23 S. C. 65.

**2. Increase in amount — Costs thrown away by postponement of trial—Amendment.]—**While the practice as to granting additional security for costs has been relaxed in favour of the granting of such security, the plaintiff, however, must not be checked at every stage of the action by security being ordered dollar for dollar for all costs incurred, or which might be incurred, without regard to the conduct of the parties.—On the commencement of an action security to the amount of \$200 was ordered. After the action had proceeded, \$300 further security was ordered; and, on a commission to take evidence being issued, a further sum of \$100. On the action coming on for trial the defendants were granted leave to amend their pleadings, and, on the plaintiffs stating that they were not ready to proceed on the amended record, the trial was postponed, the costs of the day being made costs in the cause to the successful party. The defendants then obtained an order from a local Master directing \$600 further security to be given.—On an appeal to a Judge, the order was set aside.—*Semble*, that the application for additional security should have been made to the Judge at the trial at the time the postponement was asked for. *Standard Trading Co. v. Seybold*, 23 Occ. N. 330, 6 O. L. R. 379.

See post, 7.

**3. Judgment dismissing action for default of—Assignment by defendant for benefit of creditors—Admission of claim.]—**An order was made for security of costs to be given within

three months. During this period the defendant made an assignment for the benefit of his creditors. The plaintiffs filed their claim with the assignee, and understood, apparently wrongly, that the claim was admitted. Judgment was afterwards signed by the defendant dismissing the action for non-compliance with the order for security. On motion by the plaintiffs the judgment was set aside on terms. *Macpherson Fruit Co. v. England*, 5 Terr. L. R. 388.

**4. Petition of right—Application by Crown—Limited company—Practice.]—**Section 69 of the Companies Act, 1862, 25 & 26 V. (U. K.) c. 89, provides that, where a limited company is plaintiff in any action, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be sufficient to pay the costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.—By s. 7 of the English Petition of Right Act, 23 & 24 V. c. 34, it is, among other things, provided that the statutes and practice in force in personal actions between subject and subject shall, unless the Court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England.—In a proceeding by petition of right in the Exchequer Court application was made for security for costs under the provision first mentioned. There was nothing to shew that it had ever been acted on in a proceeding by petition of right in England:—*Held*, that the question of the application of the provision first mentioned to such cases was not sufficiently free from doubt to justify the granting of the application. *Atlantic and Lake Superior R. W. Co. v. The King*, 23 Occ. N. 101, 8 Ex. C. R. 189.

**5. Plaintiff coming into jurisdiction — Relief—Terms.]—**A foreign plaintiff obliged to furnish security for costs may, if he comes to reside in the Province of Quebec before the expiration of the time within which he is ordered to furnish security, be relieved of his obligation on paying the costs of the order and of his motion. *Radford v. Brophy*, 5 Q. P. R. 256.

**6. Plaintiff leaving jurisdiction —Temporary absence.]—**When in the course of a suit the plaintiff leaves the Province of Quebec, security for costs will not be ordered unless a change of

residence is clearly established; and proof of mere temporary absence will not suffice. *Blood v. McDonald*, 5 Q. P. R. 451.

**7. Praecipe order — Increase in amount — Rule 1208 — Discretion.]**—Under Rule 1208, the fact of the defendant having obtained a *praecipe* order for security for costs by which a definite amount of security is provided for, will not prevent him from maintaining an application for additional security when it becomes apparent that the costs to be incurred will be greatly in excess of the amount provided for, and there is no element of vexation on the part of the applicant.—*Bell v. Landon*, 9 P. R. 100, distinguished.—Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, \$200 paid into Court in compliance with a *praecipe* order, was ordered by a Judge (on appeal from a Master's order refusing an increase) to be increased by a bond for \$600 or payment into Court of an additional sum of \$300; and the order was affirmed by a Divisional Court as a reasonable exercise of discretion.—Decision of MacMahon, J., 22 Occ. N. 414, affirmed. *Standard Trading Co. v. Scybold*, 23 Occ. N. 45, 5 O. L. R. 8.

See *ante*, 2.

**8. Praecipe order — Waiver.]**—Where it is stated in the writ of summons that the plaintiff resides out of the jurisdiction, the defendant may, even after delivering his defence, obtain the usual *praecipe* order for security for costs. *Smerling v. Kennedy*, 23 Occ. N. 112, 5 O. L. R. 430.

**9. Qui tam action—Preliminary exception — Deposit — Chambers motion.]**—A motion for security *judicatum solvi* in a *qui tam* action is a preliminary exception which must be accompanied by the deposit required by Art. 165, C. P., even since the amendment by 1 Edw. VII. c. 24.—2. The fact that a motion is brought before a Judge in Chambers does not change the nature of it, and if it is not accompanied by a certificate of the deposit required by law, it will be dismissed. *Raymond v. Larouche*, 6 Q. P. R. 39.

**10. Real Property Act — Petition — Caveator out of Province—Property in Province — Mortgage — Praecipe—Irregularity.]**—A caveator proceeding under the Real Property Act by way of

petition to establish a claim to the land after service of notice at the instance of the applicant for a certificate of title must, as a general rule, be treated as the plaintiff in the proceedings, and, if he is resident out of the jurisdiction, must give security for the caveatee's costs.—2. That the caveator's claim is in respect of a registered mortgage on the land, upon which he swears there is money owing and unpaid, will not take the case out of the general rule, if the caveatee in good faith disputes that there is anything due or owing on the mortgage.—3. Under such circumstances the ownership of the mortgage within the jurisdiction will not relieve a caveator from the necessity of furnishing other security for costs.—*Armstrong v. Armstrong*, 18 P. R. 55, distinguished.—Objection was taken to the regularity of the *praecipe*, being the first proceeding taken by the caveatee in the matter, for want of the indorsement of his place of residence and description upon it as required by the practice of the Court.—*Held*, that under Rule 335 of the King's Bench Act, no effect should be given to the objection, as it was purely technical, and it did not appear that the interests of the caveator had been or could be affected by the irregularity, if it were one. *Lang v. Smith*, 14 Man. L. R. 258.

**11. Residence out of Province—Family in Province—Business out of.]**—The plaintiff was manager of a joint stock company, carrying on business in Ontario, with his head office at Woodstock. His wife and family resided at Woodstock. He was agent of the company at Detroit, but visited his family once a fortnight, and sometimes once a month, but not as a rule for longer than a day and a half at a time.—*Held*, on motion for security for costs under Rule 1198 (a), that the plaintiff under the above circumstances must be taken to reside in Ontario. *Moffatt v. Leonard*, 23 Occ. N. 306, 6 O. L. R. 383.

**12. Residence out of Province—Petition for interlocutory injunction.]**—A motion for an interlocutory injunction made by petition before the issue of the writ of summons, is not an action or a suit or a process, and the party making such motion cannot, even if he does not reside in the Province of Quebec, be ordered to furnish security for the costs of the petition. *Ozorn Co. of Toronto v. Lyons*, 5 Q. P. R. 238.

**13. Residence out of Province—Plaintiff a judgment creditor of defendant.]**—Where plaintiff, a resident out of the jurisdiction, having a judgment in the St. John County Court



against the defendant for \$67.75, which was defeated by certain conveyances made by the defendant, brought a suit to have the same set aside as fraudulent and void, he was ordered to give security for costs. *Gould v. Britt*, 23 Occ. N. 231, 2 N. B. Eq. Reps. 453.

**14. Residence out of Province—***Rule 1198 (b).]*—A man of about thirty years of age, who had since childhood lived in the United States, came to Toronto in October, 1902, to inspect for his employers, brokers in New York, a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks, and he then was employed as a telegraph operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with that business the plaintiff was accused by the defendant of fraud, and arrested, this action for damages being brought in consequence thereof. He was an unmarried man, and had been in the habit of living with his mother in Kansas City when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there:—*Held*, that under these circumstances the defendant was entitled to security for costs of the action. *Kavanaugh v. Cassidy*, 23 Occ. N. 224, 5 O. L. R. 614.

See APPEAL, VIII. 3, IX. 1, 2—ARREST, III. 5—ATTACHMENT OF DEBTS, II. 5—BANKRUPTCY AND INSOLVENCY, I. 13—DISTRIBUTION OF ESTATES, 4—MUNICIPAL CORPORATIONS, XVI. 1, 2—MUNICIPAL ELECTIONS, 2, 4—PARTNERSHIP, 4—PLEADING, IV. 3, 5, 8, X. 4—WRIT OF SUMMONS, I. 1.

## VIII. TAXATION.

**1. Costs of appeal—Dismissal as to one party—Half fees.]**—Where an appeal is dismissed upon motion as to one of the parties only, the advocate's fee will be the whole fee fixed by the tariff, and not merely the half of such fee. *Leduc v. Parish of St. Louis de Gonzague*, 5 Q. P. R. 448.

**2. Counterclaim — Instructions — Brief — Counsel fees — Costs of taxation and appeals.]**—In an action to which the defendant pleaded a counterclaim, the plaintiff was held entitled to the costs of the action, and the defendant to the costs of the counterclaim:—*Held*, that the defendant, as part of her costs, was entitled to tax a counsel

fee, and that the fact that there was no reply to the counterclaim was not material, it being the existence of the defence to the action which determined whether it was a case for a counsel fee or not:—*Held*, following *Atlas Metal Co. v. Müller*, [1898] 2 Q. B. 506, that the defendant was not entitled to tax "instructions to sue," but was entitled to tax "instructions for counterclaim."—With respect to the amount of "brief" and "counsel fee" taxed, the taxing master's judgment ought not to be disturbed, especially after it had been affirmed by a Judge.—The "one-sixth rule" (O. 63, r. 23) is imperative, and there being in this case no reason for departure from it, the appeal of each party should have been and should now be dismissed with costs. *Bauld v. Fraser*, 36 N. S. Reps. 21.

**3. Criminal libel — Action—Stay**—*Criminal Code, ss. 833-5.]*—Decision in 22 Occ. N. 127, 9 Brit. Col. L. R. 21, affirmed. *Nichol v. Pooley*, 9 Brit. Col. L. R. 363.

**4. Exhibit—Specially obtained document.]**—The costs in relation to an exhibit which forms part of the documents of title of the party who files it, should not be included in taxation unless it is stated that such copy has been specially ordered and obtained for the purpose of filing it in the action. *Lavoignat v. Mackay*, 5 Q. P. R. 408.

**5. Items—Copies of interlocutory orders — Rehearing of motion.]**—In the district of Montreal the practice is to put upon the record copies of all the judgments rendered in the course of the pendency of a cause; and the costs of such copies will be taxed.—2. If a motion seeks for a condemnation in a case in which the opposite party has not conformed to an order of the Court, there is ground for presenting anew the motion in the case in which the order has not been executed, and, therefore, to claim a fee for re-hearing. *Werthemmer v. Boulanger*, 5 Q. P. R. 293.

**6. New tariff.]**—Plaintiff taxed, in 1896, his costs of recovering judgment, and on appeal it was ordered that there should be a new trial and that the costs of the first trial should follow the event. Plaintiff, finally, in 1901, recovered judgment with costs:—*Held*, that the costs of the first trial were not now taxable under the new tariff, which came in force in 1897, but that the old taxation must stand.—*Seemle*, costs incurred before the new tariff came into force are still taxable under the old tariff. *Harris v. Dunsmuir*, 9 Brit. Col. L. R. 317.

**7. Petition for revision — Desistment from taxation.]**—A party who has had a bill of costs taxed to him adversely, may, after a petition for revision of the taxation has been presented and taken into consideration, desist from the certificate of taxation obtained by him, upon paying the costs of the petition for revision. *Bergeron v. Brunet*, 5 Q. P. R. 429.

**8. Solicitor's letter before action.]**—A debtor is not obliged to pay the costs of a letter before action received from an advocate. *Rious v. Plaisance*, Q. R. 21 S. C. 574; *Lay v. Cantin*, Q. R. 23 S. C. 405.

**9. Solicitor's letter before action.]**—A debtor who receives a solicitor's letter, cannot, as against the solicitor, or the creditor, be required to pay a fee for such letter. *Robson v. Smith*, 5 Q. P. R. 252.

See post IX.

#### IX. WITNESS FEES.

**1. Allowance by trial Judge — Revision—Special expenses.]**—The Court has no power to revise the taxation of a witness made in open Court at the trial; counsel must then urge their objection, and, if required, seek the remedies available as to judgments of the Court.—2. If a party wishes to recover special expenses incurred in connexion with a suit, taxation after judgment is not the proper proceeding therefor. *Buchan v. Montreal Bridge Co.*, 5 Q. P. R. 237.

**2. Revision.]**—Where it is admitted that a witness complained of the insufficiency of the amount of his taxation, and it is established that he was examined as an expert, he is entitled to have his taxation revised after judgment rendered, and this with costs against the party who subpoenaed him, although judgment was in favour of such party. *Guinea v. Campbell*, Q. R. 22 S. C. 262.

**3. Revision—Professional person.]**—The taxation of a witness by the prothonotary is subject to revision by the Judge in the same way as the taxation of costs.—2. A professional man (*e.g.*, a member of the Bar), not called as an expert witness, is only entitled to \$1 a day and expenses. *Gardner v. Marchildon*, 5 Q. P. R. 323.

#### COUNCILLORS.

See MUNICIPAL CORPORATIONS, IV.

#### COUNSEL.

See JUDGMENT, II. 8.

#### COUNSEL FEES.

See COSTS, II.

#### COUNTERCLAIM.

See PARTIES, 1, 2—PLEADING, I.—SALE OF GOODS, III. 3.

#### COUNTERFEIT.

See COPYRIGHT, 3.

#### COUNTY COURTS, BRITISH COLUMBIA.

See APPEAL, I., III.—COURTS, I.

#### COUNTY COURTS, MANITOBA.

See FRAUDULENT CONVEYANCE, 1.

#### COUNTY COURTS, NEW BRUNSWICK.

See COURTS, III.

#### COUNTY COURTS, NOVA SCOTIA.

See APPEAL, V.

#### COUNTY COURTS, ONTARIO.

See APPEAL, VII.

#### COURT OF APPEAL FOR ONTARIO.

See APPEAL, VI.

#### COURT OF COMMISSIONERS.

See PROHIBITION.

## COURT OF KING'S BENCH, QUEBEC.

See APPEAL, VIII.

## COURT OF REVISION.

See APPEAL, II. 4 — ASSESSMENT AND TAXES, VII. 4.

## COURTS.

- I. BRITISH COLUMBIA — COUNTY COURTS.
- II. BRITISH COLUMBIA — SMALL DEBTS COURTS.
- III. NEW BRUNSWICK — CITY COURT OF SAINT JOHN.
- IV. ONTARIO—DISTRICT COURTS.
- V. ONTARIO—DIVISION COURTS.
- VI. ONTARIO — HIGH COURT OF JUSTICE.
- VII. QUEBEC—CIRCUIT COURTS.
- VIII. QUEBEC—RECORDER'S COURT OF MONTREAL.
- IX. QUEBEC—SUPERIOR COURT.

See APPEAL—COSTS, VI. 8, 10—JUDGMENT, II. 2—PLEADING, VI., VII. 2—RAILWAY, III. 3.

### I. BRITISH COLUMBIA—COUNTY COURTS.

**1. Jurisdiction** — *Discovery* — *Oral examination*.]—A County Court Judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories. *Roberts v. Fraser*, 22 Occ. N. 438, 9 Brit. Col. L. R. 296.

**2. Practice**—*Setting aside judgment and granting new trial*.]—Held, that a County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict: he is to be guided in granting a new trial by the same principles as the full Court. *Hutchins v. British Columbia Copper Co.*, 23 Occ. N. 340.

**3. Territorial jurisdiction**—*Judgment by default*—*Application to set aside and for leave to defend*—*Waiver*.]—In a plaint in the County Court of Yale it appeared that the defendants resided in Vancouver, outside the county of Yale, and the plaintiff's claim was described as being "against the defendants as makers

of a promissory note for \$179.12 dated 12th March, 1902, payable two months after date." Judgment for the plaintiff was signed in default of a dispute note, but afterwards the defendants filed a dispute note (what it contained was not shewn), and applied to the Judge to have the judgment set aside and for leave to defend on the merits. On the hearing of the application it appeared that the Court had jurisdiction, as the note sued on was produced on affidavit, and it shewed on its face that it was made and payable within the county of Yale:—*Held*, that County Court process should shew jurisdiction on its face, but the defendants, by filing the dispute note, and applying for leave to defend on the merits, had waived their right to object to the jurisdiction. *Beaton v. Sjolander*, 23 Occ. N. 161, 9 Brit. Col. L. R. 439.

See JUDGMENT DEBTOR, 1—MALICIOUS PROSECUTION, 1.

### II. BRITISH COLUMBIA — SMALL DEBTS COURTS.

**Jurisdiction** — *Judgment debtor* — *Committal*—*Notice of motion*—*Solicitor* — *Waiver*.]—A notice by a judgment creditor's solicitor of an application to a magistrate of a Small Debts Court for an order to commit a judgment debtor because of failure to pay instalments ordered to be paid on the return of a judgment summons, is a nullity.—A judgment debtor by appearing pursuant to such notice does not waive his right to object at any stage. *In re Wazstock*, 9 Brit. Col. L. R. 433.

### III. NEW BRUNSWICK—CITY COURT OF SAINT JOHN.

**Judgment of**—*Estoppel by*—*Review by County Court*—*Action against bail*—*Jurisdiction of Supreme Court*—*Relief of bail*.]—The Supreme Court has jurisdiction to try an action against bail given in a cause originating in an inferior Court, and has power to give such relief to the bail as justice may require. The former practice of the King's Bench in England of refusing to try such actions and of compelling them to be brought in the inferior Court has never been followed in this Province.—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause, which had been commenced and tried in the City Court

of Saint John, and the defendant by plea denied the jurisdiction of that Court, and at the trial gave evidence in support of his plea:—*Held*, that the defendant was not estopped by the judgment of the City Court from offering such proof, and that, as the plaintiff had chosen to rely entirely upon the estoppel, he must fail. The fact that the judgment relied upon by way of estoppel had been affirmed upon review by a County Court Judge made no difference. *Jack v. Bonnell*, 35 N. B. Reps. 323.

#### IV. ONTARIO—DISTRICT COURTS.

**Jurisdiction — Recovery of land—Mortgages—Injunction—High Court action—Multiplicity.**—The plaintiffs, being mortgagees of land, issued out of the District Court for the district in which the land was situated a writ of summons indorsed with a claim to "recover possession" of the land, "and for an order that the defendants do forthwith deliver up possession" thereof, describing the land:—*Held*, that the indorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R. S. O. 1897 c. 109, s. 9, s.s. 2 (d).—*Independent Order of Foresters v. Pegg*, 19 P. R. 80, distinguished.—The fact that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief as in the other action, was not a ground for enjoining the plaintiffs from proceeding in the District Court. *Central Trust Co. of New York v. Algoma Steel Co.*, 23 Occ. N. 329, 6 O. L. R. 464.

#### V. ONTARIO—DIVISION COURTS.

**1. Garnishment of married man's wages—Exemption—Evidence of marriage—Repute—Prohibition.**—In an action in a Division Court, where the Judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man, and so entitled to the \$25 exemption provided for by R. S. O. 1897 c. 70, ss. 180, 181:—*Held*, that the Judge did not decide upon a state of conflicting facts, but upon a theory that the best evidence must be given, and that it was a wrong assumption in point of law; and prohibition should be ordered.—*Eaton v. Rose*, L. R. 4 Q. B. 4, followed. *In re Rochon v. Wellington*, 23 Occ. N. 69, 5 O. L. R. 102.

**2. Jurisdiction—Dividing cause of action—Division Courts Act, s. 79—Promissory note—Including in larger claim—Proof against insolvent estate.**—The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim:—*Held*, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a Division Court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of s. 79 of the Division Courts Act, R. S. O. 1897 s. 60, forbidding the dividing of a cause of action. *Harvey v. McPherson*, 23 Occ. N. 260, 6 O. L. R. 60.

See BANKRUPTCY AND INSOLVENCY, III. 1.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

#### VI. ONTARIO—HIGH COURT OF JUSTICE.

**Divisional Court—Reference of motion to—Power of Master in Chambers—Agreement of parties.**—The Master in Chambers has no power to refer a motion before him to a Divisional Court, but the Court may properly hear a motion so referred, if both parties agree to its being heard. *Rushton v. Grand Trunk R. W. Co.*, 23 Occ. N. 295, 6 O. L. R. 425.

See *ante* IV.

#### VII. QUEBEC—CIRCUIT COURTS.

**Territorial jurisdiction—Defamation—Place where letter received.**—An action based upon a letter containing defamatory words sent from the district of Three Rivers to the address of a person living in the district of Arthabaska, where the letter is received and read, may be brought in the latter district. *Marcotte v. Thérien*, Q. R. 22 S. C. 315.

See *post* IX. 2-7. See also CONTRACT, IV. 6.

#### VIII. QUEBEC — RECORDER'S COURT OF MONTREAL.

**Jurisdiction — Salary — Forfeiture—Certiorari.**—The Recorder's Court of the City of Montreal has jurisdiction to entertain a cause in which salary is

claimed, and this although the contract contains clauses providing for forfeiture of a certain amount in case of default in execution of the contract.—2. The Superior Court cannot upon *certiorari* take cognizance of a question of law concerning the retention, as in a case of forfeiture, of a certain part of a salary, the question not having been raised before the Recorder's Court. *Société Anonyme des Théâtres v. Fouquet*, 5 Q. P. R. 248.

See post IX. 8.

## IX. QUEBEC—SUPERIOR COURT.

**1. Inscription in review — Appeal — Tutors—Authorization.]**—An application for review is an appeal within the meaning of Art. 306, C. C.; and, therefore, an inscription before the Court of Review made by tutors, without the authorization of a Judge or of the prothonotary upon the advice of a family council, is illegal and void. *Beaumont v. Lamonde*, 6 Q. P. R. 6.

**2. Jurisdiction — Circuit Court—Amount involved—Arrearages of annual settlement.]**—A Circuit Court held at the chief town of a district is not competent to entertain a personal action for \$12 for arrearage of an annual settled rent.—2. The Superior Court is competent to entertain such an action, which may, therefore, originate in a Superior Court. *Lebel v. Langlois*, Q. R. 22 S. C. 239.

**3. Removal of action from Circuit Court — Future rights.]**—Under Art. 55, C. P., an action for \$99 begun in the Circuit Court in respect of matters which might affect future rights, cannot be removed to the Superior Court. *Roy v. Ferland*, Q. R. 23 S. C. 1, 5 Q. P. R. 188.

**4. Removal of action from Circuit Court — Landlord and tenant—Rental value.]**—A tenant to whose demand his landlord pleads that the rental value of the demised premises is not that alleged in the declaration, cannot have the case removed from the Circuit Court to the Superior Court. *Shearer v. Marks*, Q. R. 22 S. C. 472, 5 Q. P. R. 304.

**5. Removal of action from Circuit Court — Motion — Declaration—Future rights.]**—There is no ground for removing a cause from the Circuit Court to the Superior Court except in the cases provided for in Art. 49, C. P.—2. When the ground for removal does not appear by the demand, the declaration for removal must allege, and must be accom-

panied by documents or a deposition establishing *prima facie*, that the action is removable.—3. Removal of a cause is granted only where there are future rights relating to the party who makes the motion for removal. *Corporation D' Aqueduc de Richmond v. Johnson*, Q. R. 22 S. C. 65.

**6. Removal of action from Circuit Court — Municipal taxes—Appeal—Future rights.]**—There is no appeal from a judgment rendered by the Circuit Court in a municipal matter, and, therefore, a defendant, sued for municipal taxes, cannot, even if his defence affects future rights, have the case removed into the Superior Court. *Town of Nicolet v. Imperial Oil Co.*, 5 Q. P. R. 205.

**7. Removal of action from Circuit Court — Stage of cause.]**—A defendant who wishes to have a suit removed into the Superior Court, must do so before filing his defence on the merits. *Commissioners of Railways at the Barriers of Montreal v. Penniston*, 5 Q. P. R. 445.

**8. Removal of action from Recorder's Court—Notary — Agent for sale of land.]**—A notary, sued for having acted as agent for the sale of immovables, cannot before the trial demand by *certiorari* the removal of the cause from the Recorder's Court of Montreal to the Superior Court, the proof of the agency for the sale of immovables and the nature of the transaction being within the competence of the Recorder's Court. *Laliberté v. City of Montreal*, 5 Q. P. R. 395.

**9. Stenographers — Appointment—Prothonotary — Interference by Court.]**—The prothonotary of the Superior Court is the person who alone has the choice of stenographers to take down the evidence in causes tried before the Superior Court and in appealable causes tried before the Circuit Court, the competence of such stenographers having been first established by examinations taken before a committee of the Bar named by the district council; and the Court has no jurisdiction to interfere in a matter so purely discretionary, and to order the prothonotary to insert upon his list the name of the stenographer to whom the Bar council has granted a certificate of competence. *Perrault v. Turcotte*, Q. R. 23 S. C. 436.

**10. Territorial jurisdiction—Contract of hiring—Place of hiring.]**—An action for damages by a day labourer against his employer for wrongful dismissal, loss of salary and time, and suffering, may be begun in the district in

which the agent of the employer engaged the plaintiff. *Pepin v. Turner Lumber Co.*, 5 Q. P. R. 178.

See CONTRACT, IV. 4, 5.

### COVENANTS.

See LANDLORD AND TENANT, III. 2, 6—  
LIE PENDING, 1—MORTGAGE, 1—  
PRINCIPAL AND SURETY, 3.

### COVENANTS IN RESTRAINT OF TRADE.

**1. Breach — Injunction — Damages — Waiver — Assignment of covenant.]**—The defendant covenanted with the plaintiff that he would not directly or indirectly engage in the drug business in a certain village, or within a radius of ten miles therefrom, during a term of five years, and that he would not open or have part in a third or further drug store during a term of ten years. The plaintiff sold his share in the drug business to the defendant, and actively promoted a partnership between him and his (the plaintiff's) son, which was continued for some months, when the defendant sold out to the son.—The plaintiff afterwards acquired the business and sold it to his co-plaintiff, by bill of sale, reciting the covenant, and extended its benefit to the purchaser, and covenanted with him to save him harmless from a breach of the covenant by the defendant.—In an action to restrain the defendant from carrying on a third drug store which he had opened:—*Held*, that for the first five years there were two concurrent severable covenants, and that while the plaintiff might by his conduct have waived a breach of the first, not to enter into business during the five years, he had not waived any breach of the second, not to open or have part in a third store.—*Held*, also, that the covenant was assignable, and that the right to enforce it did not terminate by reason of the plaintiff having gone out of business; and an injunction was granted restraining the defendant from opening, carrying on, or having part in, a third store for the ten years. *Berru v. Days*, 23 Occ. N. 221, 5 O. L. R. 629.

**2. Dissolution of partnership — Agreement not to engage in competing business — Breach — Interlocutory injunction.]**—A partnership existed between members of the plaintiff company and the defendant for the purpose of carrying on a general tobacco business. Upon the dissolution of this partnership the plaintiff company was incorporated,

the business being transferred to it, and the former partners binding themselves not to enter in any other business or to compete with the company. Subsequently defendant withdrew from the company, being paid in stock both for his share in the partnership, for his goodwill, and for his refraining from competing with the company. The defendant afterwards established a small business almost next door to the plaintiff company's place of business, the new business being carried on in the name of his brother, J. Granda, although the latter was at that time in Spain, and knew nothing about the matter until his return. The plaintiff company applied for an interlocutory injunction restraining the defendant from buying tobacco or otherwise taking part in a business of the new concern:—*Held*, that the defendant had violated his undertaking by making purchases for J. Granda.—*Interlocutory injunction granted.* *Cook v. Briscois*, 2 Q. P. R. 162, followed. *Granda Hermanos y Ca. v. Granda*, 23 Occ. N. 118.

**3. Dissolution of partnership — Continuance of business — Customers — Advertising — Name — Injunction.]**—The plaintiff and defendant carried on business in the city of Halifax, under the firm name of Miller Bros. & Macdonald. In 1902 the partnership was dissolved by agreement, whereby all the interest of the defendant in the firm business was transferred to the plaintiff, "together with the goodwill, firm name, etc., and "including every matter and thing in which the co-partnership money of the said Miller Bros. & Macdonald has been placed or invested." It was also agreed that the defendant should not "carry on business under said name or in any way interfere" with the use of such name by the plaintiff. The defendant subsequently went into business as "Miller Bros. & Co.," and published a circular in the papers advertising the fact "for the benefit of my old customers:—"*Held*, that defendant was not at liberty to appeal to the customers of the old firm, nor to use a name so similar to the one prohibited; and an injunction was granted. *Macdonald v. Miller*, 23 Occ. N. 299.

### CREDITORS' RELIEF ACT.

See EXECUTION, IV. 6.

### CREDITORS' TRUST DEEDS ACT.

See BANKRUPTCY AND INSOLVENCY,  
III. 2.

## CRIMINAL LAW.

- I. EVIDENCE.
- II. OFFENCES.
- III. PROCEDURE.
- IV. SUMMARY CONVICTION.

See APPEAL, I.—CANADA TEMPERANCE ACT—CERTIORARI — CONTEMPT OF COURT, VI.—COSTS, VI. 7, VIII. 3—EXTRADITION — INDIAN — JUSTICE OF THE PEACE — LIQUOR ACT OF ONTARIO —MALICIOUS PROSECUTION — MANDAMUS, 2—MUNICIPAL CORPORATIONS, I. 1, 3, VI. 2, XV.—STATUTES—SUNDAY.

## I. EVIDENCE.

**1. Canada Evidence Act, 1893—***Husband and wife—Competency of witness — "Communication" — Statute—Privilege—Directions by legal adviser—Reference to Hansard debates — Method of interpretation.*—Under the provisions of the Canada Evidence Act, 1893, the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify; *MILLS, J.*, dissenting.—Evidence by the wife of the person accused, of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify; *MILLS, J.*, dissenting.—*Per GIBBOURD, J.* (dissenting):—The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo, de facto, or de corpore*. Sexual intercourse is such a communication, and in the case under appeal neither the evidence by the accused that bloodstains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received.—*Per MILLS, J.* (dissenting):—Under the provisions of the Canada Evidence Act, 1893, and its amendments, the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown.—*Per TASCHEREAU, C.J.*:—The report of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. *Gosselin v. The King*, 23 Occ. N. 210, 33 S. C. R. 255

**2. Right to re-examine witness.]**  
—The right to re-examine follows upon

the exercise of the right to cross-examine, and, even if inadmissible matter be introduced in cross-examination, the right to re-examine remains, and the rule holds good where the witness volunteers the statement. If it be desired to avoid re-examination upon such matter, it must be expunged at the instance of the party cross-examining; while it remains as part of the testimony, the right to re-examine upon it also remains.—Ruling of *MEREDITH, C.J.*, at the trial, reversed; and a new trial ordered. *Re v. Noel*, 23 Occ. N. 293, 6 O. L. R. 385.

See post II. 1, 3, 4, 8, 9, 10, 12, 13, III. 9, 11.

## II. OFFENCES.

**1. Advertising medicine intended to prevent conception—Evidence to support conviction — Functions of Judge and jury — Acquittal — New trial.]**—The evidence of the Crown, upon an indictment for an offence against s. 179 (c) of the Criminal Code, shewed that the defendant conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets."—The Judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned:—*Held*, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception; and therefore it would have been right to have left the case to the jury; and a conviction might have been supported.—It is for the Judge to determine whether a document is capable of bearing the meaning assigned to it, and for

the jury to say whether, under the circumstances, it has that meaning or not.—The Court declined to direct a new trial. *Rez v. Karn*, 23 Occ. N. 219, 5 O. L. R. 704.

**2. Bigamy — Defence — Dissolution of former marriage — Decree of foreign Court — Validity — Domicil.**—Upon an indictment of the defendant for bigamy the defence was, that she had been divorced from her husband by the decree of a foreign Court:—*Held*, that the marriage being a Canadian one, and the domicil of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed. *Magurn v. Magurn*, 3 O. R. 570, 11 A. R. 178, and *Lemcurier v. Lemcurier*, [1895] A. C. 517, followed. *Rez v. Woods*, 23 Occ. N. 220, 6 O. L. R. 41.

**3. False pretences — Evidence — Admissibility.**—On an indictment charging the accused with having obtained goods by false pretences from a company named, with intent to defraud, so soon as it has been proved that he did the act charged, evidence of false representations made to persons other than the president and general manager of such company, on other and distinct occasions, is admissible to shew that the accused, at the time he made the false representations to the president and general manager of the company, on whose information the prosecution was brought, was pursuing a course of similar acts, and to prove guilty knowledge of the falsity of the pretence charged in the indictment and the intention with which the act charged was done. *Rez v. Komienky*, Q. R. 12 K. B. 463.

**4. Illegal fishing — Fisheries Act — Evidence — Complaint — Indefiniteness — Conviction — Distress — Imprisonment.**—Evidence that a person was seen on the river in a canoe between ten and eleven o'clock at night with the appliances commonly used in illegal salmon fishing, is, in the absence of any explanation of the situation and where the charge is not denied on oath, sufficient to justify a conviction for illegal fishing under the Fisheries Act.—A complaint charging the accused with having been engaged in illegal fishing in contravention of the Fisheries Act is too indefinite to support a conviction for illegal fishing under the Act.—Imprisonment may be adjudged under the Act for default in payment of a penalty imposed without awarding a distress. *Rez v. Fraser, Ex p. Dixon, Ex p. Lennon*, 36 N. B. Reps. 109.

**5. Importing alien labourer — “Knowingly” — Conviction — Amendment — Evidence of alienage — Person born abroad of British parents.**—Conviction of the defendant for that he did unlawfully prepay the transportation, and assist and encourage the importation and immigration of an alien and a foreigner from the United States into Canada under contract and agreement made previous thereto to perform labour and service in Canada by working at a factory, quashed as clearly bad on its face, inasmuch as the conviction did not state that the defendant “knowingly” did the acts charged, nor in fact did the information charge him with having “knowingly” done them, as required under 1 Edw. VII. c. 13, s. 3:—*Held*, also, that this omission from the information and conviction of one of the essential elements of the offence was not a mere irregularity or informality or insufficiency within the meaning of s. 889 of the Criminal Code.—It was not a matter of form merely, but of substance, and a fatal and incurable defect in the conviction.—*Semble*, also, that the person imported by the defendant was not an alien, but a British subject, the presumption from the only facts in evidence being that he was born of British parents residing in the United States. *Rez v. Hayes*, 23 Occ. N. 88, 5 O. L. R. 198.

**6. Keeping common gaming house — “Gain” — Payment for refreshments — Profit — Misdirection — Acquittal of defendant — Crown case reserved — New trial.**—The defendant was indicted for keeping a common gaming house, contrary to ss. 196 (a) and 198 of the Criminal Code.—The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing “poker.” Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The “rake-off” did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play:—*Held*, that “gain” may be derived indirectly as well as directly; that by what the defendant allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of



what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players.—The direction of the Judge at the trial to the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved by the Crown, but the Court declined to order a new trial. *Re x v. James*, 23 Occ. N. 220, 6 O. L. R. 35.

**7. Manitoba Grain Act—Offences against — Station agent — Allotting cars to shippers.**—Where a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and has also grain stored in another elevator at the same point, in common with other grain, for which he holds storage tickets, it is not a violation of the Manitoba Grain Act and amendments for the station agent to refuse to recognize the farmer as an applicant and to recognize his order in the order book for a car or cars to ship out his grain.—2. Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his had each obtained one car, but not sufficient cars to fill the orders, while the farmer had not yet been allotted a car by reason of the shortage, and the agent out of the next cars which arrived refused to award him a car, but awarded them to those who had already received each one car, there was a violation of the Act.—3. Where each of the prior applicants had been supplied with one car at the time when the farmer gave his order, but on the day previous there had been a surplus of cars after each prior applicant had been given one, and such surplus was distributed among them, but their orders still remained unfilled, it was not a violation of the Act for the agent to allot to each of the prior applicants a car from a lot which arrived to be loaded on the day of the farmer's application, and to refuse him one.—4. Where a farmer who had grain to ship made order for one car in the order book, requiring it to be placed at the loading platform to be loaded, and the agent allotted a car each to the elevator companies having elevators at the point, but whose orders were subsequent to the farmer's, and refused to allot him one, there was a violation of the Act. *In re Castle and Beniot*, 23 Occ. N. 143.

**8. Manslaughter — Parent's omission to provide necessary medical treatment for child — Legal duty — Lawful excuse — Religious belief—"Necessaries"**

— *Admission of evidence — Judge's charge.*—The word "necessaries" in s. 210 of the Criminal Code, which enacts that "everyone who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessities of life," includes proper medical aid, assistance, care, and treatment.—And, therefore, where the jury found that the prisoner, a Christian Scientist, had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age, when it was reasonable and proper that such treatment should be provided, and that the child died from such neglect:—*Held*, that the defendant had been guilty of an indictable offence under s. 210 of the Code, which enacts that every one who as parent, guardian, or head of a family, is under a legal duty to provide necessities for any child under sixteen, is criminally responsible for omitting without lawful excuse to do so, etc.—Remarks upon the Judge's charge as to "authorized" medical aid and upon the admission of evidence of cures believed to have been wrought by Christian Scientists, even as shewing good faith. *Re x v. Lewis*, 23 Occ. N. 257, 6 O. L. R. 132.

**9. Murder—Evidence—Dying declaration—Indian woman—Hearsay evidence.**—Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way. A justice of the peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter, and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the justice of the peace then signed the statement. To some of the questions the woman indicated her answers by nodding her head.—At the trial the statement was tendered as a dying declaration, and the doctor, the justice of the peace, and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:—*Held*, disapproving *Regina v. Mitchell*, 17 Cox C. C. 503, that the statement was admissible as a dying declaration: also that it had been properly proved.—An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration.—A dying declaration may be obtained by means of questions and answers, and if it is reduced to

writing it is sufficient if the answers only appear in the writing. *Rea v. Louie*, 23 Occ. N. 274, 10 Brit. Col. L. R. 1.

**10. Murder—Evidence of guilt—Continued silence of prisoner—Story in witness box—Inference—Judge's charge—New trial—Evidence in rebuttal—Cumulative testimony.]**—The prisoner, who was tried and convicted of murder, although he had ample time and opportunity to tell all he knew concerning the crime both to the authorities and others, maintained a complete silence respecting it, with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon one G., a young companion, who was with him, and who, before and at the trial, had alleged the prisoner's guilt. The Judge, in charging the jury, told them that they were entitled to take this continued silence of the prisoner into consideration, and after deciding whether or not such silence proceeded from a consciousness of guilt and a desire to spring a defence upon the Crown, which it might not be able to meet, they might therefrom draw an inference as to his guilt or innocence. He further instructed them that this continued silence of the prisoner was an element that might assist them in determining the amount of credence that ought to be given to the story told by the prisoner in the witness box:—*Held*, that the charge was correct in both respects; and even if erroneous, as in the opinion of the Court no substantial wrong or miscarriage had been occasioned thereby, such error was cured by proviso (f) of s. 746 of the Code.—The witness G., in the original case of the Crown, swore that the murder had been committed about three o'clock in the afternoon, and that he and the prisoner were back in the city about five o'clock. The prisoner swore that the crime was not committed until about five o'clock, and that the clocks were striking six when he and G. were coming back to the city. The Crown, by permission, then called a witness to contradict the prisoner as to the time of G.'s return to the city; and the Judge allowed the prisoner's counsel to put in a witness in reply:—*Held*, that the evidence so put in by the Crown was contradictory; and further, as it was in the discretion of the Judge in what order he would receive evidence, and as the prisoner had had the opportunity of replying, of which he had taken advantage, that a new trial on the ground that such evidence was cumulative should be refused. *Rea v. Higgins*, 36 N. B. Reps. 18.

**11. Perjury—Judicial proceeding—De facto tribunal—Jurisdiction.]**—An information under R. S. Q., Art. 5551, for trespass upon lands in the county of Huntingdon, in the district of Beauharnois, was laid, heard, and decided before the recorder of Valleyfield, an *ex officio* justice of the peace within the whole district, but who did not reside in the county where the offence was charged to have been committed, and was, therefore, without jurisdiction to hear the case, as R. S. Q., Art. 5561, provides that such offences shall be cognizable only by a justice or justices resident within the county where the offence has been committed:—*Held*, affirming the judgment in Q. R. 11 K. B. 477, that the hearing of said charge by the recorder, acting as a justice of the peace having power to hear it, was a judicial proceeding within the meaning of s. 145 of the Criminal Code, and that the appellant was rightly convicted of perjury committed by him upon such hearing, notwithstanding that the recorder had no jurisdiction over the subject matter of the complaint. *Drew v. The King*, 23 Occ. N. 148, 33 S. C. R. 228.

**12. Resisting distress—School taxes—Evidence—Notices—Canada Evidence Act—"Proceeding."]**—On the trial of an accused on a charge of having unlawfully resisted and wilfully obstructed an official trustee of a school district in making a lawful distress and seizure, the production of the tax and assessment rolls of such school district with entries thereon of the dates of the mailing of the notice of assessment, and of the tax notice to the accused, and of the posting of such tax roll, initialled with what purports to be the initials of the official trustee of such school district, is evidence of the mailing of such notices and of the posting of such tax roll.—Such prosecution is a "proceeding" within the meaning of s. 2 of the Canada Evidence Act, 1893. *Rea v. Rapay*, 5 Terr. L. R. 367.

**13. Seduction of girl under 16—Evidence—Corroboration—Functions of Judge and jury.]**—In a prosecution under the Criminal Code, s. 181, for the seduction of a girl under 16, in addition to the evidence of the girl, evidence was given by other witnesses to the following effect:—That the accused and the girl were found in a house alone; that the accused came out partly dressed; that he was then leaving sheep (which were in his charge) unattended and refused to go with the witness to where the sheep were; that before he was charged with any offence he stated to the witness "that he had been advised if he could get the girl away and marry her, he would escape

punishment."—*Held*, that the girl was corroborated in some material particular by evidence implicating the accused, within the intention of the Criminal Code, s. 684.—*Semble*, that the fact that the accused, in giving evidence on his own behalf, stated that he had first had connexion with the girl at a date after she had reached 16, while one of the witnesses for the prosecution stated that the accused, two months before that date, had admitted with reference to the girl that he had "got there," might, though this admission was made after the girl had reached 16, be taken into consideration with the other facts as tending to implicate the accused.—Whether there is any corroborative testimony is a question for the Judge, but if there is any such testimony, the sufficiency of it, and the weight to be given it, is for the jury, unless of course the corroboration is so slight that it ought not to be left to the jury at all. *Regina v. Wyse*, 2 Terr. L. R. 103.

**14. Theft — Conversion — Misdirection.**—The mere fact of a person converting to his own use goods found by him does not of itself as a matter of law make him guilty of theft.—Where, on the trial of a charge of theft, the jury after retiring asked the question, "Does raising a temporary loan on anything found constitute theft?" and the Judge answered "Yes."—*Held*, that the answer was equivalent to a direction that as a matter of law the accused was guilty, and was a misdirection. *Regina v. Slavin*, 35 N. B. Reps. 388.

**15. Theft—Juvenile offender—Imprisonment—Warrant of commitment—Defect—Amendment—Discharge.**—The defendant was detained under a warrant of commitment from a magistrate, reciting a conviction of the prisoner before that magistrate, for the offence of fraudulently and without colour of right taking and converting to his own use one stove of the value of \$5, the property of one W., with intent to deprive said W. absolutely of the said stove.—A return to an order in the nature of a *habeas corpus* made under R. S. N. S. c. 181, shewed that the prisoner was detained under a warrant of commitment made the 9th January, 1903, a copy of which was annexed, and that he came into the custody of the keeper of the home, under said warrant on said last mentioned day, and was detained on said warrant until the 22nd January, 1903, when, being still in custody, the magistrate caused to be delivered to the keeper of the home a certain other warrant of commitment, under which the prisoner had been detained ever since:—*Held*, or-

dering the discharge of the prisoner, that the return to the order was bad, because neither it nor the second commitment shewed that the magistrate intended to amend the first warrant, or substitute the second one for it. *In re Elmy v. Sawyer*, 1 A. & E. 843, followed. *Rea v. Venot*, 23 Occ. N. 71.

**16. Theft—Magistrate's conviction—Juvenile offender—Place of imprisonment—Duration of sentence—Discharge—Order for further detention—Circumstances.**—The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing a small sum of money out of the contribution box of a church. The magistrate's return shewed that the defendant pleaded guilty, and was committed for two years to the Provincial Reformatory. He was taken to the Reformatory and sent on to the Central Prison and kept there in custody under the warrant of commitment to the Reformatory.—On a motion for his discharge on the return of a *habeas corpus*:—*Held*, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the Reformatory and in sending him on a sentence of two years to the Central Prison.—*Held*, also, that s. 785 of the Criminal Code is intended to comprehend summary trial "in certain other cases" than those enumerated in s. 783, and that when the offence is charged and in reality falls under s. 783 (a), it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under s. 787:—*Held*, also, that, under the circumstances, this was not a case for further detention or the direction of further proceedings under s. 752; and an order for the defendant's discharge was granted. *Rea v. Hayward*, 23 Occ. N. 48, 5 O. L. R. 65.

### III. PROCEDURE.

**1. Bail—Indictable offences—Forgery—Theft.**—The petitioner had been committed for trial on two charges of forgery and one of theft. The Judge for the judicial district in which the offences were alleged to have been committed refused to admit him to bail. A petition was then presented to the Court of King's Bench:—*Held*, that the propriety of admitting to bail a person charged with indictable offences which were formerly classed as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing to take his trial, which is the object of bail, and not with reference to his supposed

guilt or innocence. In determining the probability of such appearance it is proper to consider the nature of the offence charged and its punishment, the strength of the facts against the accused, his character, his means, and his standing.—In accordance with these principles it was ordered that the petitioner should be admitted to bail. *Rea v. Fortier*, 23 Occ. N. 115.

**2. Crown case reserved—Academic questions.]**—The Court of Appeal should not be asked, by a reserved case, to solve questions on which the validity of a conviction does not necessarily depend. *Rea v. Woods*, 23 Occ. N. 220, 6 O. L. R. 41.

**3. Crown case reserved—Application for—Grounds—Misapprehension of jurors—Statements by.]**—It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; and it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case. *Rea v. Mullen*, 23 Occ. N. 169, 5 O. L. R. 373.

**4. Crown case reserved—Leave to appeal.]**—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case. *Rea v. Karn*, 23 Occ. N. 219, 5 O. L. R. 704; *Rea v. James*, 23 Occ. N. 220, 6 O. L. R. 35.

**5. Grand jury—Constitution of.]**—Motion to quash an indictment on the ground that thirteen grand jurors had not been returned, as required by s. 2 of the Jurors' Act Amendment Act, 1899.—A sheriff, when about to summon, pursuant to s. 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented, and did not summon him:—*Held*, that the grand jury was not legally constituted, and that an indictment found by the jurors who had been summoned must be quashed.—A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of s. 636 of the Criminal Code. *Rea v. Hayes*, 23 Occ. N. 342.

**6. Grand jury—Indorsing names of witnesses on indictment—Abortion—Form of indictment.]**—The provisions of s. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate

the indictment.—An indictment under s. 273 of the Code charging accused "with unlawfully using on her own person . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient. *Rea v. Holmes*, 22 Occ. N. 437, 9 Brit. Col. L. R. 294.

**7. Grand jury—Swearing in—Foreman—Omission to initial names of witnesses—Effect on indictment—Submission of record—Depositions—Crown case reserved.]**—1. It is essential that, at the time the foreman of the grand jury is sworn, the other jurors be present and hear the oath taken by their foreman. And, therefore, where it appeared that none of the other jurors were in the box at the time their foreman was sworn, that there was no certainty that the oath taken by him was heard by them, that the other jurors were only sworn, afterwards, to observe the same oath which their foreman had taken, and that objection was duly made by motion to quash, before the arraignment of the defendant, the indictment found by the grand jury was held to be null and void.—2. The omission by the foreman to initial the names of the witnesses examined before the grand jury, as required by law, is a fatal defect, and has the effect of annulling the indictment.—3. The submission of a record to the grand jury, in order that they may examine certain exhibits, and verify certain statements made by witnesses examined before them, is not a fatal irregularity, where it is proved that the decision of the grand jury was arrived at without reference to the depositions contained in such record.—4. The objections to the indictment above mentioned are proper grounds for a reserved case. *Bélanger v. The King*, Q. R. 12 K. B. 69.

**8. Indictment—Particularity—Statement of offence—Preferring of indictment—Order—(Grand jury.)**—Where a person is charged with an offence, the indictment should describe it with such particularity as will enable the accused to know exactly what he has to meet. An indictment which stated the offence in the language of the section of the Criminal Code supposed to have been violated, without setting out the particular facts constituting the offence, was quashed, for want of particularity, and also because it was not preferred in accordance with s. 641 of the Code. The Attorney-General did not in person or even by his authority prefer the indictment, and the informal direction of a Judge to the foreman of the grand jury, recognized by a formal order after the indictment had actually been preferred, was insufficient. *Rea v. Beckwith*, 23 Occ. N. 307.

**9. Preliminary inquiry before magistrate — Discretion — Evidence — Re-opening.]**—In a criminal matter the preliminary *enquête* before the magistrate in respect of an offence which may be prosecuted by way of information, is not, properly speaking, the *enquête* of the complainant but that of the magistrate.—2. At the time of the preliminary hearing, after the *enquête* of the prosecution has been declared closed, and nothing has been shewn against the accused, and even after the parties have been heard as to the legal effect of the evidence, the magistrate has a discretion to permit the prosecutor to re-open the *enquête* to make more ample proof. *Bélanger v. Mulvena*, Q. R. 22 S. C. 37.

**10. Private prosecutor — Right to take part in proceedings.]**—Held, on motion for a *certiorari*, that, though it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, and cannot insist that he, or counsel retained by him, shall aid in the conduct of the prosecution. *Rex v. Gilmore*, 23 Occ. N. 298, 6 O. L. R. 286.

**11. Trial—Jury—Influence upon, by Judge's remark—Conspiracy—Evidence—Reserved case—Prejudice of juror—New trial—Affidavits—Misconduct.]**—A verdict cannot be impeached in consequence of an observation made by the Judge presiding while the trial was proceeding, unless such observation was calculated to influence the jury against the defendant; and, consequently, a remark of the presiding Judge to the defendant's counsel while the jury was being sworn, that "if you continue to challenge every man who reads the newspapers, we shall have the most ignorant jurors selected for the trial of this cause," is not a proper ground for a reserved case, it having no tendency to influence the jury one way or the other.—2. On a trial for conspiracy to defraud a railway company by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such questions could not disprove the object of the conspiracy or throw any doubt on the evidence which had been adduced to shew the object which the parties had in view.—3. An observation by the presiding Judge, in his charge to the jury, to the effect that "about forty or fifty witnesses had been

examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take forty or fifty witnesses to establish it," is not an irregularity which can constitute a ground for granting a reserved case.—4. A new trial should not be ordered in consequence of remarks made by a juror tending to shew prejudice, unless it be shewn that he was so prejudiced as to be unable to give the defendant an impartial trial.—5. An application for a new trial on the ground of improper conduct of the jury must be supported by affidavits clearly setting forth the alleged irregularity, and, in the absence of full proof under oath, the presumption is that the jury properly performed its duty.—6. The affidavits of jurors are not admissible to impeach their finding, but are admissible to support and confirm the presumption that the proceedings of the jury were correct, and that there was no misconduct. *Rex v. Carlin*, Q. R. 12 K. B. 368.

**12. Trial—Jury—Right to — Assault — Criminal Code.]**—A person charged with assault occasioning actual bodily harm contrary to s. 262 of the Criminal Code is not entitled, under s. 67 of the North-West Territories Act, to be tried with the intervention of a jury.—Section 66 extends to all minor offences included in the several offences specifically enumerated therein. *Rex v. Hostetter*, 5 Terr. L. R. 363.

**13. Trial—Place other than Court house.]**—At the trial of an indictable offence the presiding Judge has the power to order the Court to be adjourned to a place in the county other than the Court house for the purpose of allowing the jury to hear the evidence of a witness who was unable through illness to leave his home. *Rex v. Rogers*, 36 N. B. Reps. 1.

**14. Trial—Speedy trial of indictable offences—Election as to mode of trial—Time for—Indictment.]**—When, in the ordinary course, an indictment has been found for an offence with which a person who is either in custody or on bail, has been charged, and such indictment has been returned into Court and has been filed of record, the Court is regularly and exclusively seised of the case, and the accused has no right then to ask for a speedy trial and to remove the case and the indictment and the other documents forming the record to the special Court for speedy trials. *Rex v. Kominsky*, Q. R. 12 K. B. 463.

**15. Trial—Speedy trial of indictable offences—Election as to mode of trial—**

*Time for—Indictment.*—After an indictment has been found against the accused by the grand jury, it is too late for him to elect for speedy trial without a jury under part LIV. of the Criminal Code. Jurisdiction to hold a speedy trial is strictly limited by the terms of s. 765 of the Criminal Code, and such jurisdiction is only conferred where the accused has been committed to gaol for trial, or is otherwise in custody awaiting trial on the charge against him. *Rez v. Kominsky*, Q. R. 12 K. B. 329.

**16. Trial—Speedy trial of indictable offences—Election as to mode of trial—Time for—Waiver—Plea to indictment.]**

—Four accused persons, after a preliminary inquiry, were committed for trial for conspiracy to defraud, but no bill of indictment was preferred to the grand jury on such charge. A bill of indictment, however, was preferred by the Crown counsel, with the written consent of the Judge presiding in the Court of King's Bench, charging the four accused and two other persons with conspiracy. Two additional bills were preferred against the six persons, charging them with having committed other indictable offences, and the grand jury declared the three bills well founded and returned them into Court as true bills. The accused, when arraigned, severally pleaded not guilty on the three indictments, but when the Court was proceeding to fix a day for the trials, they moved that an order be made allowing them to be taken before a Judge of sessions to declare their option for speedy trial on the indictments:—*Held*, that in order to waive a trial by jury and to elect to be tried by a Judge of sessions, an information must have been laid before a justice of the peace, a preliminary inquiry must have been made, depositions giving evidence concerning the offence charged must have been taken, and the accused must have been committed for trial. *Rez v. Gibson*, 4 Can. Crim. Cas. 451, followed.—2. Whenever an accused party neglects to take the necessary steps to elect for a trial without a jury in the special Court for speedy trials, before an indictment is found against him and returned into Court, his plea to such indictment will be conclusive against him, and he cannot afterwards elect for a speedy trial without a jury: *Regina v. Lawrence*, 1 Can. Crim. Cas. 295. His plea to the indictment conclusively and exclusively fixes the form. *Rez v. Wener*, Q. R. 12 K. B. 320.

**17. Trial—Speedy trial of indictable offences—Jurisdiction of district magistrate—Criminal Code.]**—A district magistrate has no jurisdiction to try a person

for an indictable offence, except in the special cases provided by law, viz., the indictable offence must be one which is triable before the general or quarter sessions of the peace; the accused person must have been committed or bailed, for trial, and be in actual custody awaiting trial; the sheriff must have notified the district magistrate in writing that such person is so confined, stating his name and the nature of the charge preferred against him; the district magistrate must thereupon have caused the prisoner to be brought before him, and, after having obtained the depositions on which the prisoner was committed, state and describe to him the offence with which he is charged, and the prisoner must then have consented to be tried before such district magistrate without a jury. The jurisdiction to hold a speedy trial is strictly limited by the terms of ss. 765-767, Criminal Code, and the conditions specified in these sections must be strictly complied with, on pain of absolute nullity, even where the accused has expressly declared that he consents to stand his trial before the district magistrate who convicted him. *Rez v. Breckenridge*, Q. R. 12 K. B. 474.

**18. Trial—Summary trial—Assault—Penalty—Right to jury—Notification by magistrate's clerk.]**—Section 785 of the Criminal Code, 1892, as re-enacted by 63 & 64 V. c. 46, gives to the police magistrate of a city or town power to impose the same punishment for a common assault as could be imposed upon a person convicted on an indictment, when he has decided to treat it as an indictable offence and is proceeding under the summary trials part of the Code.—2. The magistrate may ask the question provided for by s. 786 of the Code through the mouth of his clerk. *Rez v. Ridebaugh*, 23 Occ. N. 236, 14 Man. L. R. 434.

#### IV. SUMMARY CONVICTION.

**1. Appeal—Magistrate stating case after appeal—Res judicata.]**—The defendant was convicted before a stipendiary magistrate for violation of certain regulations made under the Fisheries Act, R. S. C. c. 96, s. 17, and an appeal was taken to the County Court for district No. 3, where the conviction was affirmed.—No appeal was taken from the judgment in the County Court, but the stipendiary magistrate was applied to state a case for the opinion of the Supreme Court, with the view of questioning the validity of the conviction, which he did:—*Held*, quashing the case stated, that, with the judgment of the County Court

standing in the way, the defendant was precluded from asking the stipendiary magistrate to state a case for the purpose of attacking the conviction in the Supreme Court. — The judgment in the County Court, in the identical case, was binding as between the parties, and upon the stipendiary magistrate, and the matter was therefore *res adjudicata*, and one in which the magistrate could not be asked to state a case. *Rea v. Townshend*, 35 N. S. Reps. 401.

### 2. Appeal—Right of—Plea of guilty.]

—A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under s. 897 of the Criminal Code, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence, is concerned, he is not a "party aggrieved" within the meaning of s. 879 of the Criminal Code. *Rea v. Brook*, 5 Terr. L. R. 369.

**3. Justice of the peace — Master and Servant Act — Refusal to work — Information — Amendment — Form of conviction — Omissions — Distress — Costs.]** — The prosecutor hired the defendant to work on a farm and paid for the defendant's transportation thereto. The defendant worked a few hours, and then left. The prosecutor swore to an information that the defendant did "accept the sum of \$1.30 to pay his fare to B. on the condition that the said amount was to be worked out, and refused to work after reaching this place, with the exception of 4 hours," etc. The magistrate issued a warrant setting out the facts stated in the information and adding "consequently obtaining money under false pretences," and the defendant was arrested. The magistrate amended the information by adding a reference to the Master and Servant Act, 1901, but the information was not re-sworn. The amended information was read over to the prisoner and he was informed that he was to be tried under it as amended. He made no objection; the prosecutor gave evidence, and the defendant was sworn and testified on his own behalf. The magistrate adjudged that the defendant should be fined \$5 and \$4.88 costs, and if the amounts were not paid forthwith he should be committed to gaol. A note of the conviction was made and a formal conviction drawn up. The conviction form was headed "conviction for a penalty to be levied by distress," but no such term was mentioned in the body of it:—*Held*, that the nature of the offence was sufficiently clear in the original information, and any doubt was removed

by the addition of the reference to the Act. — 2. That the information having been read over, and the trial proceeding without objection, and the magistrate having the prisoner before him, even if brought there improperly, he might try him on the amended information not re-sworn, although the Act required an information on oath.—3. That the Court, being satisfied that an offence of the nature described in the conviction had been committed, and that the magistrate had jurisdiction, and that the punishment imposed was not excessive, should not hold the conviction invalid because the date and place of offence were not stated, there being power to amend.—4. That the heading formed no part of the conviction, which was correctly drawn under the statute.—5. That the costs of conveying the accused to gaol being omitted, was a matter which could be amended, if necessary, but here there were no such costs, as the prisoner never went to gaol.—6. That there was special power by 1 Edw. VII. c. 2, s. 14, under which the prisoner was convicted, to award imprisonment in default of payment; and that by R. S. O. 1891 c. 90, s. 4, that power covered costs as well as fine. *Rea v. Lewis*, 23 Occ. N. 190, 5 O. L. R. 509.

**4. Vagrancy—Conviction—Information—Facts necessary to be stated.]**—Application for *habeas corpus*. The accused was charged with being a "loose, idle person, or vagrant," and was convicted by a police magistrate, and sentenced to six months' imprisonment with hard labour. The conviction described the offence in the same terms as the information:—*Held*, that the conviction was bad in that it did not set out the facts constituting the offence.—Under s. 207 of the Code various acts constituting vagrancy are specified, and an information charging vagrancy should shew the particular facts on which the prosecution relies to establish the offence. *Rea v. McCormack*, 23 Occ. N. 207, 9 Brit. Col. L. R. 497.

See *ante*, II., 4, 5, 6, 11, 12, 15, 16.

## CROPS.

**Defence — Tilling and sowing — Harvesting.]**—In a defence claiming the value of crops the defendant is not entitled at the same time to the cost of tilling and sowing and the cost of harvesting, and a claim for the latter will be set aside upon inscription in law. *Désormeau v. Bastien*, 5 Q. P. R. 417.

See LANDLORD AND TENANT, III. 4, 7.

## CROWN.

- I. CROWN LANDS.
- II. EXPROPRIATION.
- III. PUBLIC WORKS.
- IV. OTHER CASES.

See ASSESSMENT AND TAXES, IV. 1, 2  
—COSTS, I. 6, VII. 4—REVENUE, 5—  
WATER AND WATERCOURSES, 5.

## I. CROWN LANDS.

**1. Location ticket — Conditions — Non-fulfilment—Cancellation —Prescription.]**—Under the terms of a sale from the Crown in 1857, the grantee was obliged to perform all the obligations contained in ordinary location tickets, and without residence and clearance upon the lot the grantee could not become the incommutable owner nor acquire letters patent. — 2. Prescription does not run against the Crown, which always has the right to cancel a location ticket. *Kealy v. Ryan*, Q. R. 23 S. C. 306.

**2. Swamps—Transfer from Dominion to Province—Revenues—Title.]**—By s. 1 of 48 & 49 V. c. 50 (R. S. O. c. 47, s. 4), all Crown lands in Manitoba which may be shewn to the satisfaction of the Dominion Government to be "swamp lands" are to be transferred to the Province and enure wholly to its benefit and uses. Between the date of this enactment and the various dates when transfers under it were made to the Province, the Dominion Government received certain sums of money produced by the sale of timber, hay, and other emblements off the lands so transferred:—*Held*, that until the lands were transferred the Dominion Government was entitled to the revenues. —2. When Crown lands are transferred from the Dominion to the Province or *vice versa*, there is no transfer of title; that remains all the time in the Crown. *Attorney-General for Manitoba v. Attorney-General for Canada*, 8 Ex. C. R. 337.

## II. EXPROPRIATION.

**1. Actual value—Compulsory taking — Compensation.]**—In expropriation cases, where the actual value of lands can be closely and accurately determined, a sum equivalent to ten per cent. of such actual value should be added thereto for the compulsory taking; but where that cannot be done, and where the price allowed is liberal and generous, nothing should be added for the compulsory

taking. *Symonds v. The King*, 8 Ex. C. R. 319.

**2. Leasehold property — Tenant's improvements — Expense of removal — Compensation.]**—The suppliant was tenant of certain buildings and wharves erected upon lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk dealer. The terms for which the leases were made had expired at the time of the expropriation of the lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisal, or of renewing the leases on the same terms for a further term not less than three years. No such appraisal had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence shewed that the lessor had no present intention of paying for the improvements and of resuming possession of the property:—*Held*, that, in addition to the value of his improvements, the suppliant should be allowed compensation for the value under all the circumstances of his possession under the leases at the date of the expropriation. *McGoldrick v. The King*, 23 Occ. N. 99, 8 Ex. C. R. 169.

**3. Prospective value — Assessed value.]**—Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes, such prospective value was taken into consideration in assessing compensation. — 2. In assessing compensation in this case the Court looked at the assessed value of the lands, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken. *Res v. Turnbull Real Estate Co.*, 23 Occ. N. 99, 8 Ex. C. R. 163.

## III. PUBLIC WORKS.

**1. Contract—Abandonment and substitution of work—Implied contract.]**—The suppliants contracted with the Crown to do certain work on the Cornwall canal, the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to it in the specifications, namely, "all the dredging of the Cornwall canal on section No. 8 (not otherwise provided for)" on a date named:



"that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described;" and that the engineer could, at any time before or during construction, order extra work to be done, or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By cl. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done, the Crown abandoned the scheme of constructing dams contemplated by the contract, and adopted another plan, the work on which was given to other contractors. After it was completed the suppliants filed a petition of right for the profits they could have made had it been given to them:—*Held*, affirming the judgment of the Exchequer Court, 7 Ex. C. R. 221, 22 Occ. N. 82, that the contract contained no express covenant by the Crown to give all the work done to the suppliants, and cl. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed. *Gilbert Blasting and Dredging Co. v. The King*, 23 Occ. N. 59, 33 S. C. R. 21.

**2. Contract—Delay—Forfeiture—Notice by engineer—Withdrawal of work—Damages—Interest.**—The judgment in 21 Occ. N. 280, 7 Ex. C. R. 55, affirmed. *Ree v. Stewart*, 32 S. C. R. 483.

**3. Injurious affection—Closing up street—Compensation.**—The properties of the suppliants were injuriously affected by the construction of a public work, which obstructed a highway upon which the properties, respectively, abutted. MacArthur's property was 190 feet from the place of obstruction, and Keefe's 240 feet. The suppliants' properties, instead of being respectively situated, as they were formerly, on a main thoroughfare, were, by the change effected by the construction of the said public work, situated at the extreme end of a street closed up at one end, and forming a *cul de sac*:—*Held*, that where the injurious affection concerned the personal convenience of the occupiers of the properties in question, the suppliants were not entitled to compensation, but that in so far as the value of the properties, in the hands of any one, and used for any purpose to which they could

be put, was lessened, the suppliants ought to recover therefor. *MacArthur v. The King*, Keefe v. *The King*, 23 Occ. N. 213, 8 Ex. C. R. 245.

**4. Injurious affection—Erosion—Increase of—Exchequer Court—Jurisdiction.**—Where the erosion of land by the natural action of the waters of a river was accelerated and increased by certain works erected in the river, and some dredging done therein by the Crown, a petition of right will lie for damages. —2. The jurisdiction of the official arbitrators under s. 1 of 33 V. c. 23 and s. 4 of 31 V. c. 12 was, in substance, transferred to the Exchequer Court of Canada by ss. 16, 58, and 59 of 50 & 51 V. c. 16. *Graham v. The King*, 8 Ex. C. R. 331.

**5. Negligence of Crown officials—Right of action—Injury to land—Jurisdiction of Exchequer Court—Prescription.**—Lands in the vicinity of a government canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal, and also by part of the lands being spoiled by dumping matter upon it:—*Held*, reversing the judgment in 21 Occ. N. 277, 7 Ex. C. R. 1, that the owner had a right of action and was entitled to recover damages for the injuries sustained, and that the Exchequer Court of Canada had exclusive original jurisdiction under ss. 16, 23, and 58 of the Exchequer Court Act. *Regina v. Filion*, 24 S. C. R. 482, approved. *City of Quebec v. The Queen*, *ib.* 430, referred to.—The prescription established by Art. 2261, C. C., applies to the damages claimed by the owner. *Letourneau v. The King*, 33 S. C. R. 335.

**6. Non-repair—Negligence—Navigable river—Improvements—Money voted by Parliament.**—The judgment in 21 Occ. N. 517, 7 Ex. C. R. 150, affirmed. *Hamburg-American Packet Co. v. The King*, 33 S. C. R. 252.

#### IV. OTHER CASES.

**1. Bounties on manufacture of "pig iron" and steel—Statutes—Interpretation.**—It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the

art of manufacturing iron and steel the term "pig iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether the iron when so used in a liquid or molten form was "pig iron" within the meaning of the term as employed in 60 & 61 V. c. 6 and 62 & 63 V. c. 8:—*Held*, that the term "pig iron" in the Act mentioned applied to the iron used in the manner described, and that a manufacturer or steel ingots therefrom was entitled to the bounty provided by the said Acts in respect of the manufacture of such iron. *Dominion Iron and Steel Co. v. The King*, 23 Occ. N. 1, 8 Ex. C. R. 107.

**2. Payment for services as commissioner** — *Servant — Public officer — Advocate — Solicitor and client.* — The judgment in 22 Occ. N. 201, 7 Ex. C. R. 351, affirmed. *Tucker v. The King*, 32 S. C. R. 722.

**3. Postmaster's salary**—*Allowances — Interest — Civil Service Act.* — By the Civil Service Act, R. S. C. c. 17, sched. B., a city postmaster's salary, where the postage collections in his office amount to \$20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor-in-Council or in the Postmaster-General to make the salary more or less than the amount provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute:—*Held*, that he was entitled to recover the difference.—2. That the provisions in s. 6 of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by the vote of Parliament for that purpose" was no bar to the suppliant's claim, even if it could be shewn that if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the Treasury who are intrusted with the safe keeping and payment of the public money, and not to the Courts of law. *Collins v. United States*, 15 Ct. of Clms. 35, referred to.—3. The suppliant was not entitled to interest on his claim.—4. The provision in s. 12 of the Civil Service Amendment Act, 1888, to the effect that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy-head, officer, or em-

ployee in the civil service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration, and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back. *Hargrave v. The King*, 22 Occ. N. 427, 8 Ex. C. R. 62.

## CROWN CASE RESERVED.

See CRIMINAL LAW, II. 6, III. 2, 3, 4, 7, 11, IV. 1.

## CROWN FRANCHISES REGULATION ACT, BRITISH COLUMBIA.

See CONSTITUTIONAL LAW, 6.

## CURATOR.

See BANKRUPTCY AND INSOLVENCY, I.—DISTRIBUTION OF ESTATES, 8—INTERDICT — LUNATIC, 3—PRINCIPAL AND AGENT, 6—WRIT OF SUMMONS, I. 5.

## CUSTOM.

See COSTS, I. 2—SHIP, I. 1.

## CUSTOMS DUTIES.

See REVENUE, 1, 2.

## DAM.

See WATERS AND WATERCOURSES, 1, 2, 4, 6.

## DAMAGES.

**1. Contract—Breach—Assessment by Judge — Evidence — Guess — Appeal—Concurrent findings of Courts below.** — The evidence in an action for breach of contract being insufficient to enable the trial Judge to assess damages, he was obliged to guess, as he stated, and his guess was \$5,000. This was affirmed by a Provincial appellate tribunal. The Supreme Court of Canada allowed an ap-

peal and dismissed the action, the majority holding that the result of the absence of evidence was that the damages could be no more than nominal. *ARMOUR, J.*, dissenting, was of opinion that there should be a new trial. *Williams v. Stephenson*, 33 S. C. R. 323.

**2. Expropriation of land—Assessment—Reservation of recourse for future damages—Res judicata — Right of action.]**—A lessee of premises used as an ice house recovered damages from a city corporation for injuries by the expropriation of part of the premises. In his statement of claim he had expressly reserved the right of further recourse for damages. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice house during the unexpired term:—*Held*, that the reservation did not preserve any further right of action in respect of the expropriation, and the plaintiff's action was properly dismissed, as, in such cases, all damages capable of being foreseen must be assessed once for all, and a defendant cannot be twice sued for the same cause. *City of Montreal v. McGee*, 30 S. C. R. 582, and *Chaudière Machine and Foundry Co. v. Canada Atlantic R. W. Co.*, 33 S. C. R. 11, followed. *Ancill v. City of Quebec*, 33 S. C. R. 347.

**3. Flooding land—Measure of damages—Duty of claimant to diminish.]**—Where there is, in the power of the person complaining, an obvious and inexpensive method of reducing, diminishing, or wholly doing away with the damages complained of, *e.g.*, by a short transverse drain to prevent flooding of land, it is his duty to adopt it, and, in default of his doing so, he is only entitled to recover such loss as he would have suffered if he had taken proper measures to prevent or diminish the damages. *Filiatrault v. Village of Coltau Landing*, Q. R. 23 S. C. 62.

**4. Lord Campbell's Act—Action—Bar—Life insurance.]**—The fact that a widow has, upon the death of her husband, obtained the proceeds of a policy of insurance upon his life, is not a bar to her recovering damages from the person responsible for the accident which caused his death. *Konackelston v. Dominion Bridge Co.*, 5 Q. P. R. 320.

**5. Lord Campbell's Act — Apportionment between widow and children—Other provision for widow.]**—An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three, and one year, to recover damages for the death of her husband

through the company's alleged negligence, was settled by the company paying \$4-800. On application to a Judge, the amount was apportioned by giving the widow \$1,200, and each of the children \$900, the widow also to be paid for the children's maintenance \$200 a year half-yearly for three years, the fact of the widow having already received \$1,000 for insurance on the husband's life being taken into consideration. *Burkholder v. Grand Trunk R. W. Co.*, 23 Occ. N. 155, 5 O. L. R. 428.

**6. Trespass—"Wilful" acts—Measure of damages—Judgment.]**—In an action of trespass for taking coal from a mine the judgment declared that the plaintiffs were entitled to recover damages from the defendants for and in respect of the wrongful and wilful trespass and conversion complained of in the plaintiffs' statement of claim:—*Held*, that "wilful" was not intended as an adjudication that the trespasses were wilful in the sense that would render the defendants liable to have damages assessed against them on the sterner rule; and, the defendants having entered the mine under a mistaken idea as to their rights, the milder rule was applied. The measure of damages should be the value of the coal at the mouth of the mine, less the cost of digging (heaving) it and transporting it there as a merchantable article. *Fleming v. H. W. McNeil Co.*, 23 Occ. N. 312.

**7. Warranty — Breach — Manufacture and sale of machine—Defects—Loss of profits—Property not passing.]**—The plaintiffs agreed to manufacture a goring loom fit for certain special work required by the defendants, and to deliver it by a certain time. The machine was not delivered until after the time fixed, and when delivered did not have certain fittings which were necessary for its proper working, and there were certain defects in it which the defendants, after applying to the plaintiffs to remedy them, had to rectify themselves.—In an action for the price of the loom:—*Held*, that the defendants should be allowed the sums paid in supplying the missing portions of the machine and for the services of an expert to put it in working order; that, notwithstanding that the property in the machine remained in the plaintiffs until paid for, the plaintiffs never had supplied a loom properly constructed to do the work required of it, and to do which the plaintiffs well knew the machine had been ordered; that there was a warranty that it should be fit for the purpose; that the defendants were prevented from earning the profits they would have earned if the loom had been complete; and that, under the circumstances, the plaintiffs

were liable to make such profit good. *Crompton and Knowles Loom Works v. Hoffman*, 23 Occ. N. 188, 5 O. L. R. 554.

See ATTACHMENT OF DEBTS, I. 2—BANKS AND BANKING, 1—CARRIERS, 1, 3—CHOSE IN ACTION, ASSIGNMENT OF, 2—CONSOLIDATION OF ACTIONS—CONTRACT, VI. 1—COPYRIGHT, 3—COSTS, I. 5—COVENANT IN RESTRAINT OF TRADE, 1—CROWN, III. 2—DEFAMATION, I. 3, 5, 6, II. 1, 4—EXECUTION, III. 2—INJUNCTION, 1, 4, 8, 9—LANDLORD AND TENANT, III. 4, 9, 15, 18—MALICIOUS PROSECUTION, 2—MASTER AND SERVANT, I. 2, II. 10, 13, III. 3, 4—MUNICIPAL CORPORATIONS, III. 2, XI. 2—NEGLIGENCE, 7, 8—NOTICE OF ACTION, 2—NUISANCE, 3, 4—PARTICULARS, 4—PLEADING, II. 3—PRINCIPAL AND AGENT, 3—PRINCIPAL AND SURETY, 4—RAILWAY, VI. 1, VII. 1, 3—SALE OF GOODS, III. 3, IV. 3, 4, V. 1, 3—SET-OFF—SHIP, I. 1—SPECIFIC PERFORMANCE, 3—TIMBER—TRESPASS TO LAND, 2, 3—TRIAL, III.—VENDOR AND PURCHASER, 3—WASTE—WAY, I. 2, II. 1, 3.

## DEBENTURES.

See MUNICIPAL CORPORATIONS, I. 6, V.

## DECEIT.

See PRINCIPAL AND AGENT, 7.

## DECLARATION.

See PLEADING, II.

## DECLARATORY JUDGMENT.

See JUDGMENT, I. 1, 2.

## DEDICATION.

See MUNICIPAL CORPORATIONS, XVI. 8.

## DEED.

**1. Condition subsequent — Breach — Forfeiture.**—Assignment by vendor before revesting.—*Validity.*—On the grant of a fee simple defeasible on breach of a condition, no estate is left in the grantor, but only a possibility of reverter, and,

therefore, before breach there is nothing capable of assignment. — After breach, where the deed does not provide for *ipso facto* forfeiture, the fee does not revert automatically, and until revesting by suit or otherwise there is nothing capable of assignment.—Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and reconvey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed.—In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—*Held*, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay. *Clarke v. City of Vancouver*, 10 Brit. Col. L. R. 31.

**2. Conveyance of land—Recital—Garantie—Property not passing—Cutting down to security—Presumption.**—When it is recited in an *acte d'obligation* that an immovable is transferred to a creditor by way of *garantie*, it must be presumed, in the absence of a clear and precise agreement to the contrary, that the parties have intended to make a contract of security only, and that what the debtor intends to pass to his creditor is the possession of and not the absolute property in the immovable.—2. The creditor does not become the proprietor of the immovable if it is not paid for, but has only the right to possession for the purposes of his security, to receive the profits, and to apply them first upon the interest, and then upon the principal amount. *Eglauch v. Labadie*, Q. R. 21 S. C. 481.

**3. Gift — Construction.**—“*Tous les meubles et effets mobiliers*” — *Bank deposit.*—The provisions of Arts. 396, 396, and 397, C. C., defining the sense of the words “*meubles*,” “*meubles meublés*,” “*biens meubles*,” “*meubliers*,” and “*effets mobiliers*,” when they are employed by themselves, are declaratory, and the words are given as examples to aid the interpretation of the Judge in doubtful cases. When the parties to a deed employ several times the words “*meubles et effets mobiliers*” to indicate only movable effects, and not money or choses in action, the same words repeated anew in the same provision, when where preceded by the word “*all*,” will be presumed to have been employed in the restricted sense which the parties have already given them, and will not be construed to include a deposit of money in a bank. *Sabourin v. Montreal City and District Savings Bank*, Q. R. 12 K. B. 390.

**4. Inscription en faux—Production of original.]**—If an authentic deed is alleged to be false, an order will be made upon the person in custody of such deed to produce it in order that it may form part of the record in the case for the purposes of the inscription *en faux*. *Aude v. Charest*, 5 Q. P. R. 319.

**5. Notarial act — Authentication—False date—Nullity.]**—A notarial act binds the parties who have signed it, and the signature of the notary only has the effect of authenticating it—2. The date of a notarial act is an integral and essential part of it, and the want of it nullifies the instrument.—3. When an act, to which several persons are parties, has been signed and executed by each of them on different days, a single date may be added to the act, namely, that of the day of the last signature, but it is more proper to give the several dates in the act.—4. A notarial act must bear the date of the signature of the parties, allowing the notary, if he has delayed his signature, to mention the day on which he has affixed it. Therefore, a notarial act, signed by all the parties on the 2nd July, 1902, but signed by the notary on the 3rd July, 1902, should be dated the 2nd July, 1902, and if the notary dates the act on the 3rd July, 1902, because that is the date on which he has closed the transaction, the act will be declared false as an authentic act, the Court having no other alternative, and not having the power to substitute the true date of the completion of the act for the erroneous date which the notary has put to it. *Ordway v. Veilleux*, Q. R. 22 S. C. 197.

See CHAMPERTY—FRAUDULENT CONVEYANCE—LAND TITLES ACT—LIMITATION OF ACTIONS, II. 5—MORTGAGE—RAILWAY, VII. 1—SPECIFIC PERFORMANCE, 4.

## DEFAMATION.

- I. LIBEL.
- II. SLANDER.

See COSTS. VI. 7, VIII. 3—COURTS, VII.—GIFT, 7—HUSBAND AND WIFE, IV. 4, VI. 6.

### I. LIBEL.

**1. Defamatory statement in pleading—Right of action—Good faith—Relevancy—Determination of previous suit.]**—An action against a party for a libellous statement in a judicial proceeding, raises matters concerning the relation of the subject to the administration

of justice, and, as such, is governed by the law of England.—2. Under the law of England, no damages can be recovered for injurious words, forming part of a judicial proceeding, pleaded in good faith, with probable cause and without malice, the words being relevant to the issue, although they may be subsequently shewn to be false and injurious.—*Semble*, an action for such injurious statements, instituted before the determination of the suit in which they were pleaded, is premature; but, in the present case, it was unnecessary to pronounce formally upon this point, the action being dismissed on other grounds. *Wilkins v. Major*, Q. R. 22 S. C. 264.

**2. Defamatory statement in pleading—Right of action—Prescription.]**—A person complaining of a libellous statement in a pleading filed in a suit is not bound to postpone his action for damages until final judgment has been rendered in that suit. *Semble*, were he so to delay, his action might be prescribed. *Wilkins v. Major*, Q. R. 22 S. C. 263.

**3. Newspaper — Misleading statement — Public interest — Damages—Costs.]**—The defendant published in a newspaper a statement that the plaintiff had in the Police Court pleaded not guilty to a charge of theft and had been remanded for *enquête*. As a matter of fact, the inquiry was held later in the same day, and the plaintiff was discharged. The item stating that she had been remanded, however, did not appear in the newspaper until the following day, and no mention was made of the fact that it had subsequently been discovered that the charge was unfounded. The defendant pleaded that the item was true and had been published without malice and in good faith and in the public interest:—*Held*, that, though the item was evidently published without malice and in good faith, yet, if it was in the public interest, it was equally so that the plaintiff's discharge should have been recorded. As there was no proof, however, of any pecuniary damage suffered by the plaintiff, judgment was given for \$10 and costs as of a Circuit Court action of the lowest class. *Hearn v. Graham*, 23 Occ. N. 119.

**4. Newspaper—Publishing company—Joint liability of manager.]**—The president and manager of a company incorporated for the publication of a newspaper, who is also the signer of the declaration required by Arts. 2924 *et seq.* R. S. Q., may be held responsible in damages for a libel published in the newspaper, jointly with the company. *Migneron v. La Patrie Publishing Co.*, 5 Q. P. R. 329.

**5. Newspaper — Recklessness—Absence of actual malice—Retraction—Damages.]**—Where a false report, implicating an entirely innocent person in the commission of a serious crime, has been published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, the fact that the newspaper was about to go to press at the time the information was received is not a valid excuse for failure to investigate the truth of the charge; and the fact that subsequently a retraction and apology were published in the same journal, while it may be taken into consideration in the assessment of damages, is not a sufficient reparation for the wrong inflicted on an innocent person by a false accusation. The Court in such case will award exemplary damages to an amount in proportion to the degree of negligence proved. *Auburn v. Berthiaume*, Q. R. 23 S. C. 476.

**6. Pleading — Declaration—Several counts—Particulars of damages.]**—In an action for libel and slander based upon several different counts, the plaintiff may be ordered to give particulars of the amount claimed on each distinct count. *Hogg v. Ross*, 5 Q. P. R. 339.

**7. Pleading—Statement of claim—Setting out whole newspaper article—Parts not referring to plaintiff — Innuendo.]**—The very words complained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action; it is not sufficient to give the substance or purport, with innuendoes; it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial and the defendant is entitled to have the whole of it read, the plaintiff is entitled to set out in the statement of claim the whole article complained of.—*Held*, also, that certain words set out in another paragraph, which did not refer to the plaintiff, and tendered an issue not material, which might be embarrassing, should be struck out.—*Deyo v. Brondage*, 13 How. Pr. 221, referred to. *Hag v. Bingham*, 23 Occ. N. 112, 5 O. L. R. 224.

**8. Privilege—Mercantile agency.]**—In a mortgage foreclosure action, the Lion Brewery Company as second mortgagees were joined as defendants, and a mercantile agency published in a notice or circular, distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Company claiming foreclosure of a mortgage, and indicating by means of the words "*et al.*"

that there were other defendants:—*Held*, in an action by the company against the mercantile agency, that the publication was libellous and not privileged. *Lion Brewery Co. v. Bradstreet Co.*, 9 Brit. Col. L. R. 435.

**9. Privilege—Proof of malice—Understanding of letter — Admissibility of evidence — Misdirection—New trial.]**—The defendant, local manager of an insurance company of which the plaintiff had been an agent, wrote to Mrs. F., a policy holder, a letter in which he stated, among other things, that he had relieved the plaintiff of his agency; that the plaintiff had collected money which he had not reported, etc. In libel it was shewn that the plaintiff had not been dismissed from the agency, but wanted larger commissions in continuing, which were refused, and that he was not a defaulter, but was dilatory in making his returns:—*Held*, that evidence of Mrs. F. of her understanding of the letter as imputing to the plaintiff a wrongful retention of money, was improperly received, and there was a miscarriage of justice by its admission.—The Judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true, it is malicious, and his protection is taken away."—*Held*, that this was misdirection; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true; and that it was misdirection on a vital point.—The majority of the Court were of opinion, *GIROUARD and DAVIES, JJ., contra*, that, as the defendant had asked for a new trial only in the Court below, the Supreme Court could not order judgment to be entered for him; and a new trial was granted.—Judgment in *Miller v. Green*, 35 N. S. Reps. 117, reversed. *Green v. Miller*, 23 Occ. N. 149, 33 S. C. R. 193.

**10. Proof of publication — Letter given to clerk to copy — Privilege.]**—*Held*, that the fact that the manager of the defendant company had, in the ordinary course of the correspondence of the company, handed to the company's stenographer to be typewritten by him a draft letter containing defamatory statements, but of a privileged character, did not amount to such a publication of the letter as to take away the privilege.—*Borissius v. Goblet*, [1894] 1 Q. B. 842.

followed. *Puterbaugh v. Gold Medal Co.*, 23 Occ. N. 193, 5 O. L. R. 680.

**11. Words of abuse—Natural signification—Innuendo—Necessity for showing sense in which words understood.]**—The defendant, a tax-collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and posted to the plaintiff a post-card stating: "I saw J. S. this morning; he said make the S. B. pay it."—In an action for libel in which the plaintiff alleged that "S. B." applied to him and meant "son of a bitch:"—*Held*, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff; they are words of abuse, but are, as often used, absolutely meaningless; they do not impute anything against the character of the mother, and are not a statement of a fact; and in their natural significance are not actionable; and the plaintiff had failed to prove his innuendo. *Major v. McGregor*, 23 Occ. N. 47, 306, 5 O. L. R. 81, 6 O. L. R. 528.

## II. SLANDER.

**1. Mitigation of damages—Provocation—Set-off.]**—An elector, who has made a complaint in respect of a voters' list, which a municipal council is revising, has the right to appeal from the decision of the council, but he has no right to say ostentatiously, while the council is sitting and with the object of intimidating it or ridiculing its decision, that he is going to appeal. If he does so, and the secretary-treasurer of the council, who has prepared the list and acted as clerk and adviser to the council, says to him that "it is easy for him to appeal because he is insolvent, he has not paid his taxes, and is already in debt to the municipality for costs," the manner in which this elector has acted will be taken into consideration by the Court in mitigation of damages in an action brought by the elector against the secretary-treasurer for slander on account of the words quoted.—2. A party against whom a debt cannot be set off because it is not liquidated, may, if he chooses, himself demand that it be set off. *Desmarais v. Geofrion*, Q. R. 22 S. C. 229.

**2. New slanders since action—Incidental demand.]**—Slanders uttered by the defendant after the commencement of an action for damages for previous slanders cannot be made the subject of an incidental demand in the same action, but must be the subject of a separate suit. *Lefebvre v. Godin*, 5 Q. P. R. 279.

**3. Notice given by public crier—Repair of road—Malice.]**—The defendant gave notice to the plaintiff at the door of the parish church, as the congregation were issuing from high mass, by the public crier, to repair and maintain his road and keep it open, in default of which the defendant would take the necessary proceedings to compel him to do so. The plaintiff having claimed \$195 damages for defamation on account of this notice, which he alleged had been given maliciously, the defendant, in his defence, admitted that he had given the notice, but denied having done so maliciously. Neither of the parties offered oral evidence, leaving the Court to decide the cause upon the record:—*Held*, that there being nothing to justify the defendant in giving such a notice, which should have been given privately through the municipal officers, and not publicly at the church door, the defendant was guilty of a tortious act for which he was liable to the plaintiff. *Hamel v. Lauzière*, Q. R. 22 S. C. 194.

**4. Special damage — What constitutes.]**—The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used.—Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece, from her father's estate, had put in an account of trifling matters, such as for candies, oranges, etc., the special damage alleged being that in consequence thereof the niece and wife had left him and refused to live with him:—*Held*, that such damage was not such as was recognizable at law, not being the natural and reasonable consequence of the words used. *Ludlow v. Batson*, 23 Occ. N. 151, 5 O. L. R. 309.

## DEMURRER.

See PLEADING, III.

## DEPOSIT RECEIPT.

See GIFT, J.

## DEPOSITIONS.

See EVIDENCE, I. 3, 4.

## DEPUTY RETURNING OFFICER.

See MANDAMUS, 2.

**DESISTMENT.**

**1. Order—Prothonotary—Stay—Judgment—Inscription.]** — The prothonotary has no jurisdiction to act upon or pronounce any order whatever upon a desistment.—2. When a desistment is filed at the office of the Court, instead of at the hearing, it has the effect of staying the suit or preventing the continuation of the demand, but the defendant may apply to the Court for judgment in accordance with the desistment in order to obtain the right to an execution for costs.—3. An inscription for judgment upon a desistment is a regular way, if not the only way, of obtaining judgment thereon. *Majeau v. Mutual Fire Ins. Co. of the City of Montreal*, 6 Q. P. R. 21.

**2. Party represented by solicitor—Desistment by party himself.]** — A plaintiff who is represented by an attorney *ad litem*, cannot himself file a desistment from the suit. *O'Rourke v. Rourke*, 5 Q. P. R. 405.

See ATTACHMENT OF DEBTS, II. 5, 7—COSTS, V. 2, VIII. 7—EXTRADITION, 1—JUDGMENT, IV. 3—LANDLORD AND TENANT, VI. 1—PROHIBITION.

**DETECTIVE.**

See NOTICE OF ACTION, 3.

**DEVISE.**

See WILL.

**DEVOLUTION OF ESTATES ACT.**

**Sale of lands by administrator—Non-concurring adult heirs — Official guardian.]**—Application for a direction to the official guardian to approve of a sale of certain lands, made by the applicant as administrator of his deceased brother's estate, there being heirs who were *sui juris*, but had not concurred in the sale. The application was made under s. 16 of the Devolution of Estates Act, R. S. O. 1897 c. 127, as amended by 63 V. c. 17, s. 17, which gives the official guardian power to approve the sale in such a case, as in the case of infants. There appeared to be no express objection to the sale by any of the heirs, but their concurrence had not been sought, because of the delay and expense which that would involve:—*Held*, that under the facts of this case, the proper course was for the official guardian to make the

usual inquiries, and if no good reasons were advanced or discovered for withholding his approval, it should be given. *In re Bradley*, 23 Occ. N. 298, 6 O. L. R. 397.

See ATTACHMENT OF DEBTS, I. 7—DISTRIBUTION OF ESTATES, 3.

**DIRECTORS.**

See COMPANY, I. IV. 5—DISCOVERY, I. 3.

**DISCHARGE.**

See ARREST, II. — ATTACHMENT OF DEBTS, II. 1—JUDGMENT DEBTOR, 1—PRINCIPAL AND SURETY, 3, 4.

**DISCHARGE OF MORTGAGE.**

See DOWER, 4.

**DISCLAIMER.**

See MUNICIPAL ELECTIONS, 9.

**DISCOVERY.**

- I. EXAMINATION OF PARTIES.
- II. PRODUCTION OF DOCUMENTS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4—COURTS, I. 1—DEED, 4—EXHIBITS—MINES AND MINERALS, 1—PARLIAMENTARY ELECTIONS, II. 5—PARTICULARS.

**I. EXAMINATION OF PARTIES.**

**1. Action against sheriff — Examination of sheriff's deputy.]**—In an action against two sheriffs for neglect of duty as sheriffs, an order was made for the examination for discovery by the plaintiff of the deputy of one of the defendants, it appearing that that defendant had himself being examined and had deposed that certain acts, alleged to affect the matters in question, had been done by the deputy.—Order 61 of the Supreme Court Rules should be read as supplemental to Order 31, and taken together they were authority for the order. *Hollingshead v. Armstrong*, 23 Occ. N. 73.



**2. Action for equitable execution of judgment — Right to attack judgment — Absence of fraud and collusion.]**—In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution, of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon.—A motion that a witness who, on examination for discovery, had refused to answer questions relating to such circumstances, should be compelled to attend and be examined at his own expense, was therefore refused. *Smith v. McDermott*, 23 Occ. N. 204, 5 O. L. R. 515.

**3. Company — Directors — Account of profits—Postponement of consequential discovery — Production of documents.]**—The statement of claim set forth a single cause of action, based upon the proposition that the defendant C. and his associates, as to the transactions detailed in it, in the circumstances under which those transactions took place, stood in a fiduciary relation to the defendant company, which prevented them from making any profit for themselves out of the purchase of certain businesses acquired by them and afterwards transferred for a large sum of money to the defendant company, and the relief claimed was an account and payment by the individual defendants of the difference between the aggregate of the price paid by them and what was paid by the company to them.—It was admitted that the individual defendants received from the defendant company a sum in cash and stock far in excess of what they paid for the businesses, and the only matters really in controversy were the fiduciary relationship with the company and the liability of the defendants other than the defendant company, to account for the profit made by them on the transfer to the company of the properties, and, if liability were established, the amount for which they were answerable.—*Held*, that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account asserted by the plaintiff had been established. *Bedell v. Ryckman*, 23 Occ. N. 167, 5 O. L. R. 670.

**4. Defendant withdrawing after being sworn—Order to appear again—Excuse.]**—A party to an action subpoenaed for examination for discovery before a special examiner and paid his conduct money for the day may be compelled

to attend and testify in the same manner as a witness.—One of four defendants, all of whom were subpoenaed for half past ten in the morning and attended and were sworn, after being excluded from the examiner's chambers, waited while the others were being separately examined until after three in the afternoon, and then, without communicating with the examiner, went away and did not attend for examination.—*Held*, that a local Judge's order requiring him to attend again for examination was right. *Campbell v. Scott*, 23 Occ. N. 113, 5 O. L. R. 233.

**5. Disclosing names of witnesses — Questions as to indemnity for costs.]**—On an examination of a plaintiff for discovery under Rule 379 of the King's Bench Act, he cannot be compelled to disclose the names of his witnesses, or to answer questions as to whether he has received from persons or corporations, not parties to the action, assistance or promise of assistance or indemnity as to the costs of the action, or as to whether he consulted before action with such other persons as to bringing the suit. *Gibbins v. Metcalfe*, 23 Occ. N. 98, 14 Man. L. R. 364.

**6. Officer of company — Agent of unincorporated association.]**—The plaintiffs sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as the Tanners' Association."—*Held*, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending. *Ahrens v. Tanners' Association*, 23 Occ. N. 261, 6 O. L. R. 63.

**7. Officer of railway company—Engine-driver — Rules 439, 461 (2).]**—*Held*, reversing the decision of a Divisional Court, 4 O. L. R. 43, 22 Occ. N. 162, that inasmuch as the engine-driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control, conduct, and management of the train in such a way as to make him responsible to the defendants except for the management of his engine, he was not an officer of the company examinable for discovery under Rule 439; *MACLENNAN, J.A., dubitante*.—Speaking generally, the officer of the corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the

action arises, would *prima facie* be the proper officer to be examined in the first instance under Rule 439. *Morrison v. Grand Trunk R. W. Co.*, 23 Occ. N. 9, 5 O. L. R. 38.

**8. Scope of examination — Rule 703.]**—The action was to set aside the will of Alexander Dunsmuir, on the grounds of insanity and undue influence exercised by the defendant, who was the beneficiary under the will. On the examination for discovery of the defendant, he refused to answer questions in reference to the nature and extent of the subject matter of the will, the business and personal relations that existed between him and his deceased brother, the history of their dealings with the property, the mode in which the deceased brother managed his affairs, and the circumstances leading up to and surrounding the execution of the will:—*Held*, that the questions must be answered or the defence would be struck out.—The examination for discovery under Rule 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues. *Hopper v. Dunsmuir*, 23 Occ. N. 275, 10 Brit. Col. L. R. 23.

**9. Stage of cause.]**—The preliminary examination of a party to an action may take place after the inscription of the cause. *Bourassa v. Lambert*, 5 Q. P. R. 375.

## II. PRODUCTION OF DOCUMENTS.

**1. Action for penalties.]**—It is improper in an action to recover penalties under the Extra-Provincial Corporations Act, 63 V. c. 24 (O.), to issue the usual *præcipe* order for production of documents by the defendants.—Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside. *Johnston v. London and Paris Exchange*, 23 Occ. N. 245, 6 O. L. R. 49.

**2. Affidavit — Copy of document.]**—Under 53 V. c. 4, s. 60, and form 10, an affidavit of discovery should negative possession of a copy of a document. *Burden v. Howard* (No. 2), 23 Occ. N. 206.

**3. Affidavit — Order.]**—Where inspection is sought of documents supposed to be in the possession of the opposite party, an order should be obtained under s. 59 of 53 V. c. 4, for discovery by affidavit as to what documents are in the

opposite party's possession, when an order may be made under s. 61 for their production. *Cushing Sulphite Co. v. Cushing*, 23 Occ. N. 158, 2 N. B. Eq. Repts. 458.

**4. Identification — Description in affidavit.]**—Where discovery of documents is made, it is not enough to make them up in sealed bundles marked A and B, but the documents must be identified by a mark or number and so described in the affidavit. *Cushing Sulphite Co. v. Cushing*, 23 Occ. N. 231, 2 N. B. Eq. Repts. 466.

**5. Non-materiality of documents — Foreign commission — Inspection.]**—Where discovery, as distinguished from production for the purpose of inspection, of documents, is sought, an affidavit of such documents must be given, though their production when applied for could be successfully opposed on the ground of immateriality. — Documents within the jurisdiction of the Court will not be ordered to be produced before a commissioner for taking evidence abroad except in very special circumstances.—Where inspection of documents had been given by consent, an application to the Court for further inspection was granted, and the Court declined to give effect, as too technical, to an objection that a demand in writing for inspection had not been made prior to the application to the Court. *Cushing Sulphite Co. v. Cushing*, 23 Occ. N. 231, 2 N. B. Eq. Repts. 463, 472.

**6. Ownership of land — Filing of documents of title.]**—A party who alleges that he is the owner of certain land, without alleging title or proofs in support of his allegation, will not be ordered, upon motion to that effect, to file his document of title to the property, and proceedings will not be suspended in order to compel him to file such documents. *Molson v. City of Montreal*, 5 Q. P. R. 339.

See ante I. 3.

## DISMISSAL OF ACTION.

See ACTION—INJUNCTION, 8.

## DISMISSAL OF SERVANT.

See MASTER AND SERVANT, 1.

**DISQUALIFICATION OF CANDIDATE.**

See PARLIAMENTARY ELECTIONS, III. 5.

**DISSOLUTION OF MARRIAGE.**

See HUSBAND AND WIFE, III.

**DISTRACTION OF COSTS.**

See COSTS, III.—SOLICITOR, 3.

**DISTRESS.**See ASSESSMENT AND TAXES, III.—  
CRIMINAL LAW, II. 4, 12, IV. 3—  
LANDLORD AND TENANT, I., III. 17  
—LIQUOR LICENSE ACT, V.—MUNICIPAL CORPORATIONS, XV. 2.**DISTRIBUTION OF ESTATES.**

**1. Ab-intestate succession — Inventory — Notary.]**—The choice of a notary to proceed to the inventory of an ab-intestate succession belongs to the most diligent party, especially if another party, who has had the control of the estate for some time, has failed to complete the inventory; however, the latter being the choice of the majority of the interested parties, will be appointed to assist the other notary in his inventory. *Mallette v. Mallette*, 5 Q. P. R. 422.

**2. Contestation of collocation — Leave to file after time — Affidavit.]**—Where a motion for leave to file, after the time has expired, a contestation of collocation, has been dismissed because the contestation is not accompanied by an affidavit, it is not sufficient for the contesting party to file such affidavit, but he must apply to the Court for leave to file a contestation supported by an affidavit. *Labelle v. Ouimet*, 5 Q. P. R. 232.

**3. Intestate's estate — Rights of widow — Second husband and child — Devolution of Estates Ordinance — Married Women's Property Ordinance — Land Titles Act — Imperial Intestates' Estates Act.]**—The Devolution of Estates Ordinance, c. 13 of 1901 (assented to 12th July, 1901), provides:—"1. The property of any man hereafter dying intestate and leaving a widow, but no issue, shall belong to such widow, absolutely and exclusively, provided that prior to his death such widow had not left him and lived in adultery after leaving him.—2. This section shall apply to the property of any person who died before the date of the coming into force of this Ordinance, in case no portion of the estate of such person has been distributed:—"Held, that s.s. 2 does not apply to a case where the widow died previously to the passing of the Ordinance, although no portion of the estate of the deceased husband had been distributed at the time of its passing.—The Ordinance respecting the personal property of married women, C. O. 1898 c. 47, provides that "a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a *feme sole*:"—Held, that notwithstanding this provision a husband is entitled to the whole of his deceased intestate wife's undisposed of personal property upon taking out letters of administration.—Section 3 of the Land Titles Act, 1894, 57 & 58 V. c. 28 (D.), which provides that "land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate," does not convert realty into personalty, but refers only to the manner of distribution.—The Imperial Intestates' Estates Act, 53 & 54 V. c. 29, is not in force in the Territories.—Where, therefore, S. died on the 24th December, 1899, intestate and without issue, leaving as his next of kin his father, and also his widow, who having married B., died on the 22nd April, 1901, leaving a child by B., the property of S. was directed to be distributed as follows:—One-half of the personal property to the deceased's father and the other half to B. for his own benefit, on his taking out administration to his deceased wife; one-half of the real property to the deceased's father and the other half to the administrator of the widow's estate to be distributed, one-third to B. and two-thirds to her child. *In re Steidel*, 5 Terr. L. R. 303.

**4. Judgment — Contestation — Motion to set aside — Preliminary exception — Deposit — Creditor.]**—A motion to set aside a contestation of a judgment of distribution is a preliminary exception, and must be accompanied by the deposit mentioned in Art. 165, C. P.—

2. A party making such a motion will be permitted to make a deposit upon giving notice of it to the opposite party.

—3. The contestation of a judgment of distribution by a creditor, who has not filed a claim, will be set aside if it is not accompanied by the deposit required by Art. 674, C. P. *Labelle v. Ouimet*, 5 Q. P. R. 150.

**5. Legitimation of bastard—Heirship of parent.]—**A father is one of the heirs of his natural child legitimated by a subsequent marriage with the child's mother. *Lamoureux v. Aymard*, Q. R. 24 S. C. 24, 5 Q. P. R. 432.

**6. Opposition — Collocation of married woman—Personal service — Judgment.]—**An opposition in distribution against the placing on the list of a woman who lives apart from her husband, must be served upon her and not upon her husband only. 2. A collocation which has been confirmed constitutes a judgment which cannot be attacked by an opposition in distribution. *Déary v. Bro dit Pominville*, 5 Q. P. R. 203.

**7. Report—Dispensing with — Powers of prothonotary.]—**The power to pay the money without report of distribution is given to the prothonotary alone, and not to the Judge or Court. *Gravel v. Melancon*, 5 Q. P. R. 388.

**8. Rival claims to succession—Dilapidation of property — Remedy against — Sealing up — Curator.]—**When the property of a succession is dilapidated or in danger of becoming so, the only remedy which creditors or heirs have is to cause the property to be sealed up; they cannot, so long as the time for making an inventory and deliberating has not expired, where several persons are claiming the succession, obtain the appointment of a curator. *Lamoureux v. Aymard*, Q. R. 24 S. C. 24, 5 Q. P. R. 432.

See BANKRUPTCY AND INSOLVENCY, I.—DEVOLUTION OF ESTATES ACT—DOWER, 2—EXECUTION—EXECUTORS AND ADMINISTRATORS—WILL, I.

## DISTRICT COURTS, ONTARIO.

See COURTS, IV.

## DITCHES.

See MUNICIPAL CORPORATIONS, VI.

## DIVIDENDS.

See COMPANY, IV. 5.

## DIVISION COURTS, ONTARIO.

See COURTS, V.

## DIVISIONAL COURTS, ONTARIO.

See APPEAL, VII.—COURTS, VI.

## DIVORCE.

See CRIMINAL LAW, II. 2—HUSBAND AND WIFE, I. 1, III. 2.

## DOMICIL.

See ATTACHMENT OF DEBTS, II. 10—BANKRUPTCY AND INSOLVENCY, I. 12—CRIMINAL LAW, II. 2—HUSBAND AND WIFE, IV. 3—OPPOSITION, 2, 11—PATENT FOR INVENTION, 3—SCHOOLS, 3—WRIT OF SUMMONS, I. 1.

## DOMINION LAND ACT.

See RAILWAY, VII. 5.

## DONATIO MORTIS CAUSA.

See GIFT, 1-4—HUSBAND AND WIFE, V. 1, 2—REVENUE, 4.

## DOWER.

**1. Bar of dower — Infant wife — Purchaser for value.]—**An infant wife joined to bar dower in a deed from her husband to a purchaser for value, but after her husband's death brought this action for dower:—*Held*, that by s. 5 of the Married Woman's Real Estate Act, R. S. O. 1897 c. 165, the infancy of the plaintiff was immaterial, and her right was barred.—A father conveyed land to his son in pursuance of a preceeding agreement that he would do so if the son would work the land with him for the next ensuing season:—*Held*, that the son was a purchaser for value within the meaning of s. 5. *Crossett v. Haycock*, 23 Occ. N. 285, 6 O. L. R. 259.

**2. Customary dower** — *Authorization by interdicted husband — Registry laws — Sheriff's sale — Vendor and purchaser — Warranty — Succession — Renunciation — Donation by interdct.]*

—The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed, and must also contain a description sufficient to identify the lands sought to be affected. —A sale by the sheriff, under execution against a debtor in possession of an immovable under apparent title, discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of Art. 2116, C. C.—*Per TASCHEREAU, C.J.*:—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can, on any ground whatever, attack a title for which such vendor has given warranty. — *Semble*, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity, and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization. *Rousseau v. Burland*, 23 Occ. N. 38, 32 S. C. R. 541.

**3. Equitable estate** — *Voluntary conveyance by husband.]*—It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate; a voluntary conveyance thereof, even though made with the object of preventing the wife acquiring any right to dower, being unimpeachable by her. *Fitzgerald v. Fitzgerald*, 23 Occ. N. 85, 5 O. L. R. 279.

**4. Equity of redemption**—*Conveyance by husband alone—Discharge of mortgage.]*—On the 8th February, 1881, the owner of land subject to a mortgage, dated 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the moneys advanced upon the second mortgage were applied in payment of the first mortgage, and the first mortgagees executed a discharge, which was registered on the 5th March 1881. On the 30th September, 1881, the owner executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar her dower. Neither the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the

mortgagees in the exercise of the power of sale on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th September, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of 30th September, 1881, brought this action for dower on the 11th September, 1902:—*Held*, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 V. c. 22 (O.), which became law on the 11th March, 1879.—2. The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to revert the premises in the mortgagor, but in the second mortgagees. *Anderson v. Elgie*, 23 Occ. N. 278, 6 O. L. R. 147.

## DRAINAGE.

See MUNICIPAL CORPORATIONS, VII.

## DRAINAGE REFEREE.

See REFEREES AND REFERENCES, 1.

## DURESS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 10—CONTRACT, VI. 2.

## DYING DECLARATION.

See CRIMINAL LAW, II. 9.

## EASEMENT.

**Right of way** — *Agreement — Evidence—User.]*—The plaintiff claimed a right of way over a private road 700 feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised

in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title, K., was that, shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing a right of way with them over the road. B. denied that an agreement was concluded, or that the matter ever proceeded beyond negotiation, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the land was included in the conveyance from K. to the plaintiff. The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, until it was torn down, situate about 200 feet from the public highway, and the plaintiff had used, but not without interruption, the road for about 15 years, for a considerable part of its length. Shortly after the date of the alleged agreement, fences with gates, crossing the road at separate points, were erected by H. without objection by K.:—*Held*, that the plaintiff's bill for an injunction to restrain the defendant from obstructing plaintiff in the use of the road, should be dismissed. *Fairweather v. Robertson*, 23 Occ. N. 232, 2 N. B. Eq. Rpts. 412.

See NEGLIGENCE, 5 — WATER AND WATERCOURSES, 1, 2, 3, 7—WAY, II. 2.

### **ECCLESIASTICAL DECREE.**

See HUSBAND AND WIFE, III. 1.

### **ELECTION.**

See CRIMINAL LAW, III. 14, 15, 16—INSURANCE, III. 3—OPPOSITION, 11 — PLEADING, IV. 3 — VENDOR AND PURCHASER, 2.

### **ELECTIONS.**

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS.

### **ELECTRIC COMPANIES.**

See ASSESSMENT AND TAXES, VII. 2—COMPANY, IV. 1—CONTRACT, II. 2.

### **EMBLEMENTS.**

See LANDLORD AND TENANT, III. 5.

### **EMMENAGOGUE.**

See CRIMINAL LAW, II. 1.

### **EMPHYTEUSIS.**

See RAILWAY, VII. 1.

### **EMPLOYERS' LIABILITY ACT, BRITISH COLUMBIA.**

See MASTER AND SERVANT, II. 4-9.

### **EMPLOYERS' LIABILITY ACT, NOVA SCOTIA.**

See MASTER AND SERVANT, II. 10.

### **EQUITABLE ASSIGNMENT.**

See CHOSE IN ACTION, ASSIGNMENT OF, 1.

### **EQUITABLE ESTATE.**

See DOWER, 3.

### **EQUITABLE EXECUTION.**

See DISCOVERY, I. 2—RECEIVER.

### **EQUITABLE INTEREST.**

See LANDLORD AND TENANT, III. 7.

### **EQUITABLE RELIEF.**

See JUDGMENT, I. 1.

**EQUITY OF REDEMPTION.**

See DOWER, 4.

**EROSION.**

See CROWN, III. 4.

**ESCROW.**

See SPECIFIC PERFORMANCE, 4.

**ESTATE.**

See CHURCH, 2—WILL.

**ESTOPPEL.**

See COSTS, III. — EVIDENCE, IV. 2 — EXECUTORS AND ADMINISTRATORS, 3 — HUSBAND AND WIFE, IV. 3, VIII. 3 — MINES AND MINERALS, 5 — MISTAKE—RAILWAY, VII. 1—REVENUE, 4—SCHOOLS, 5.

**EVICITION.**

See LANDLORD AND TENANT, III. 16—VENDOR AND PURCHASER, 9.

**EVIDENCE.****I. ADMISSIBILITY.****II. AFFIDAVITS.****III. CORROBORATION.****IV. FOREIGN COMMISSION.**

See APPEAL, II. 1, 3 — ASSESSMENT AND TAXES, VI. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—CONTRACT, III. 2—COPYRIGHT, 2—COSTS, VIII. 4 — CRIMINAL LAW, I. II. 1, 3, 4, 8, 9, 10, 12, 13—DAMAGES, 1—DEED, 2—DEFACTION, I. 9, 10—DISCOVERY—EASEMENT — EXECUTORS AND ADMINISTRATORS, 4, 5 — EXHIBITS—GIFT, 1, 2, 3, 4, 9—HUSBAND AND WIFE, I. 1, IV. 2, IX. 2, 6—INSURANCE, II. 1, III. 5—JUDGMENT, II. 6—JUDGMENT DEBTOR, 3—LANDLORD AND TENANT, VII. 1 — LIMITATION OF ACTIONS, II. 1—MALICIOUS PROSECUTION, 2 — MASTER AND SERVANT, I. 3, II. 8, 11

—MINES AND MINERALS, 6—NEW TRIAL — OPPOSITION, 8—PARLIAMENTARY ELECTIONS, II. 6, III. 2, 3—PARTICULARS—PEREMPTION, 8—SALE OF GOODS, IV. 1, 2—SPECIFIC PERFORMANCE, 2 — TRIAL, II. 4—WATER AND WATERCOURSES, 9—WILL, III. 2.

**I. ADMISSIBILITY.**

**1. Admissions—Divisibility — Commencement of proof in writing.]**—Where a contract is admitted to have been entered into by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the adducing of evidence by parol as to the amount of the consideration or as to the conditions of the contract.—In such a case, the rule that admissions cannot be divided against the party making them does not apply. *Campbell v. Young*, 23 Occ. N. 38, 32 S. C. R. 547.

**2. Admissions—Divisibility — Commencement of proof in writing—Architect — Plans — Agreement.]**—In an action brought by architects, claiming fees for the preparation of sketches or designs for the defendant, the latter, when examined as a witness, admitted that the sketches had been prepared for him by the plaintiffs, but stated that there was an understanding that they were not to be paid for unless used by him, and that they had not been used. It appeared that the defendant, at the time the plans were invited, had not yet purchased the land for the proposed buildings, and that he had asked for plans from several architects:—*Held*, that the admission of the defendant could not be divided, for the purpose of obtaining a commencement of proof, there being no improbability in his statement, or indication of bad faith, or other circumstance, to bring the case within the exceptions of 60 V. c. 50, s. 20 (Q.), amending Art. 1243 of the Civil Code. *Coa v. Pacaud*, Q. R. 23 S. C. 9.

**3. Depositions in another action.]**—The provision of Art. 292, C. P., "A Judge may order that the evidence taken in one action may serve in another." must be interpreted as applying to evidence not already taken, but which is to be taken, the parties being aware at the time that it will be useful in another cause. *Boutin v. Traders' Advertising Co.*, 5 Q. P. R. 359.

**4. Depositions of witnesses—Use on motion for new trial—Contradicting evidence given at trial.]**—The plaintiff,

having given notice of motion for a new trial on the ground of surprise, in that certain witnesses, called for the plaintiff, had withheld evidence which they could have given in his support at the trial, and were willing to give such evidence if a new trial were granted, subpoenaed three of these witnesses under Rule 491, for examination before a local registrar upon the motion for a new trial:—*Held*, that Rule 491 applies to motions for a new trial pending before a Divisional Court.—*Held*, however, that evidence of persons who had been witnesses at the trial, that the evidence they then gave was not in fact true, and that certain statements made by them before trial to the plaintiff's solicitor (which was avowedly the evidence sought to be obtained here by the examination in question) were true, would not be receivable. *Rushton v. Grand Trunk R. W. Co.*, 23 Occ. N. 295, 6 O. L. R. 425.

**5. Parol evidence** — *Contradicting valid writing*—Commencement of proof by writing—*Documents*—*Inscription de faux*—Oral evidence will not be admitted to contradict the terms of a writing validly made whether as a commencement of proof by writing or any other kind of oral testimony.—2. An *inscription de faux* is only required when it is desired to prove the falsity of what a public officer declares that he saw or heard himself. *O'Malley v. Ryan*, Q. R. 21 S. C. 566.

**6. Parol evidence** — *Work done* — *Request*.]—On a claim for repairs done by the lessee at the request of the lessor, and board of men, exceeding \$50, the request cannot be proved by parol evidence. *Caron v. Gaudet*, 6 Q. P. R. 23.

**7. Relevancy** — *Fraud* — *Similar transactions*.]—In an action to set aside a bill of sale of a mineral claim, on the ground that it was forged by one of the defendants, evidence was given by the plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence witnesses were allowed to give evidence shewing that the plaintiff and his witnesses, in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy, and tending to shew that a like fraudulent scheme was being attempted in this case, and the result was that the Judge was so influenced by this evidence that he gave judgment for the defendants:—*Held*, that the evidence on behalf of the defendants was properly admitted. *D'Avignon v. Jones*, 23 Occ. N. 71, 9 Brit. Col. L. R. 359; affirmed, 32 S. C. R. 650.

## II. AFFIDAVITS.

**Swearing** — *Foreign notary*.] — A notary public for the State of New York has authority, under Art. 30, C. P., to receive affidavits, within his State, for use in the Courts of the Province of Quebec. *Schwob v. Baker*, 5 Q. P. R. 441.

## III. CORROBORATION.

**Breach of promise of marriage**—*Imperial statute*.]—The Imperial statute 32 & 33 V. c. 68, s. 2, requiring the plaintiff's evidence in an action for breach of promise of marriage to be corroborated by some other material evidence in support of such promise, is in force in Manitoba, not being either expressly or by implication repealed by the Manitoba Evidence Act, 57 V. c. 11, now c. 57 of R. S. M. 1902. *Cockrell v. Harrison*, 23 Occ. N. 123, 14 Man. L. R. 366.

## IV. FOREIGN COMMISSION.

**1. Application for—Evidence on.**] —Application was made for a commission to examine a witness resident in the United States, the application being based on an affidavit of the partner of the defendant's solicitor, on information obtained by him from M., the defendant's agent. There was no affidavit from M., personally, and nothing to shew that the evidence of the witness could not have been obtained before he left the jurisdiction, or that the facts said to be in the knowledge of the witness could not be supplied by other persons:—*Held*, that the application was properly dismissed. *McPherson v. Riter-Conley Mfg. Co.*, 35 N. S. Repts. 429.

**2. Application for, during trial** — *Refusal* — *Adjournment by consent* — *Appeal* — *Estoppel*.]—During the progress of the trial, and after a number of witnesses on behalf of the plaintiffs had been examined, the defendants' counsel applied for a commission for the examination of a witness who was absent in British Columbia, and for a postponement of the trial. The witness in question was a son of one of the defendants, who was aware of his absence, but the fact was not brought to the attention of the defendants' counsel until the day on which the trial was commenced.—The trial Judge having refused both the commission and the postponement:—*Held*, that there was no reason for interfering with his discretion on these points.—After the commission applied for had



been refused, the plaintiffs' counsel offered to agree to an adjournment for a reasonable time, to be fixed by the Court, to enable the defendants to produce the witness, should they desire to do so, and the case was adjourned from the 8th January to the 17th February.—On the latter day, the case being called, the defendants' counsel stated that he had no further evidence to offer, and judgment was given for the plaintiffs:—*Held*, that the defendants, having accepted the offer made on behalf of plaintiffs, and obtained an adjournment of the case, were not in a position to revert back to their original rights, and claim a review of the judgment. *Stephen v. Thompson*, 35 N. S. Reps. 390.

**3. Irregularity—Waiver—New trial—Defect in evidence.**—Where a commission to take evidence was issued without a formal order therefor, but merely on an informal memorandum of a Judge, containing no direction as to the commissioners' name, or the time, place, or manner of taking the evidence, but the commission, before being sent out, had been shewn to the advocate for the opposite party, and due notice of the time and place of taking the evidence under the commission had been served on him, and on the return of the commission it had been opened at his instance:—*Held*, that the irregularities in connection with the issue of the commission, which might at an earlier stage have been taken advantage of by motion to suppress, were waived by the advocate for the opposite party, with knowledge of the irregularities, causing the commission to be opened: that being a fresh step within the meaning of s. 541 of the Judicature Ordinance.—2. That in any case, the trial Judge having received the evidence, and s. 501 of the Judicature Ordinance providing that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless, in the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial, and the Court being of the contrary opinion, no effect should be given to the objection.—Trial of action adjourned to enable plaintiff to supply defect in the evidence in support of his case under s. 236 of the Judicature Ordinance. *Hamilton v. McNeill*, 2 Terr. L. R. 31.

**4. Return—Delay—Nullity—Omission to put questions.**—The execution of a foreign commission and the return of the commissioner after the time fixed, by the consent of the parties, are not necessarily causes of nullity, especially when no prejudice has been occasioned.

2. If the commissioner has omitted to put to a witness certain questions, his return will not be received, his proceedings being incomplete, but such omission does not render the proceedings void, and the Court, in that case, will order the record to be sent back to the commissioner with instructions to put the questions and so complete his proceedings. *Thibault v. Poulin*, Q. R. 22 S. C. 371, 5 Q. P. R. 180.

**5. Trial Judge—Postponement of trial.**—The Judge to whom an application is made for a *commission rogatoire* may refer the same to the trial Judge, who will, in his discretion, after having heard the evidence, grant or refuse the motion, and, in the former case, postpone the trial in order to permit the execution of the commission. *Armstrong v. Gillies*, 5 Q. P. R. 423.

See DISCOVERY, II. 5.

## EXAMINATION.

See DISCOVERY, I. — INFANT, 3—JUDGMENT DEBTOR, 2—PARLIAMENTARY ELECTIONS, II. 5.

## EXCEPTION.

See PLEADING, IV.

## EXCHANGE OF LANDS.

See MORTGAGE, 3—WILL, II. 17.

## EXCHEQUER COURT OF CANADA.

See COSTS, VII. 4—CROWN, III. 4, 5.

## EXECUTION.

I. EXEMPTIONS.

II. PROCEDURE.

III. PROPERTY LIABLE TO SEIZURE.

IV. SALE.

See ARREST, I.—ATTACHMENT OF DEBTS, II. 10—BANKRUPTCY AND INSOLVENCY, I. 15. V. 1—BANKS AND BANKING, 3—COMPANY, III. 1. 11—COSTS, III. 1. 2—DOWER, 2—GIFT, 8—HUSBAND AND WIFE, VI. 2, VII. 3, VIII. 2. IX. 1, 2, 3—JUDGMENT, II. 5, IV. 5—LAND

LORD AND TENANT, III. 1, 7, 12—MINES AND MINERALS, 4—NOTICE OF ACTION, 1—OPPOSITION—RAILWAY, VIII. 2—RECEIVER—REGISTRY LAWS, 2—SHERIFF.

## I. EXEMPTIONS.

**1. Homestead—Sale of—Mortgage taken in part payment—Receiving order.]**—The Exemptions Ordinance, C. O. 1898 c. 27, s. 2, s.s. 9, declares the following real property of an execution debtor and his family free from seizure by virtue of all writs of execution, namely:—(9) "The homestead, provided the same is not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon."—*Held*, that mortgage moneys, forming part of the proceeds of the sale of the defendant's homestead, do not come within this provision.—This provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily disposed of it, the language of the Ordinance is not wide enough to extend the exemption to the proceeds, unless they are re-invested in other exempt property before a creditor has acquired a charge or lien upon them.—Receiving order, as equitable execution, discharged. *Massey-Harris Co. v. Schram*, 5 Terr. L. R. 338.

**2. Homestead — Value—Notice.]**—*Held*, that the execution debtor was entitled, as an exemption under the Homestead Act, to \$500 out of \$1,000 realized by the sheriff on the sale of a steamship, the only exible personality of the debtor.—*Vye v. McNeill*, 3 Brit. Col. L. R. 24, approved.—*Semle*, that notice of claim of exemption is necessary. *Yorkshire Guarantee and Securities Corporation v. Cooper*, 23 Occ. N. 302, 10 Brit. Col. L. R. 65.

## II. PROCEDURE.

**1. Creditor collocated on moneys levied—Insolvency — Sub-opposition—Sub-collocation.]**—*Held*, in review, affirming the *dispositif* of the judgment in Q. R. 23 S. C. 45, but modifying the *considérants*, that Art. 824 of the Code of Procedure, which authorizes a creditor of a person who is entitled to be collocated, or who is collocated, upon moneys levied, to file a sub-opposition, does not confer any privilege on such creditor. If the person primarily entitled to be collocated is insolvent, the amount of the collocation must be distributed among his creditors, according to law. The service of a writ of attachment, attaching such

moneys in the hands of the sheriff, does not give the sub-opponent any special right thereto: Art. 1981, C. C. *Marion v. Brien dit Desrochers*, Q. R. 23 S. C. 52.

**2. Guardian of property seized—Discharge—Lapse of time—Destruction of property seized.]**—A judicial guardian is not discharged from his guardianship by the expiration of a year from the day of the seizure, and a rule will issue against him to make him produce the goods intrusted to him if he does not prove that they have been destroyed without fault on his part. *Millar v. Gillespie*, 5 Q. P. R. 376.

**3. Opposition to seizure—Dismissal—Execution of judgment of Court of Review—Time for.]**—A motion for the dismissal of an opposition cannot be made before the original thefeof is returned.—2. An opposition which raises the question whether a judgment of the Court of Review, in a summary matter, can be executed within eight days from the rendering thereof, is not frivolous, and will not be dismissed on motion. *Kavanagh v. Quinn*, 5 Q. P. R. 166.

**4. Opposition to seizure—Insaissabilité — Investment of moneys bequeathed — Declaration — Registration.]**—A declaration of investment, stating that a purchase of property has been made with moneys bequeathed to the purchaser on condition of *insaissabilité*, may be set up in opposition to a seizure of such property by a creditor of the purchaser, although the declaration was not registered until after the creditor's claim had accrued. *Baird v. Morphy*, Q. R. 23 S. C. 497.

**5. Opposition to seizure—Security—Time for—Hypothecary creditor—Tenant.]**—An hypothecary creditor, whose claim has been registered before the registration of a lease of the immovable hypothecated, may require from the tenant, who files an opposition to a seizure by such creditor, asking that the immovable may be sold subject to his lease, security that the immovable will be sold for a price sufficient to assure him the amount which is due to him (Art. 726, C. P. C.). 2. He may require such security as soon as the opposition is filed and without admitting the ground of the opposition. *Desaulniers v. Payette*, Q. R. 12 K. B. 445.

**6. Reduction of amount of judgment after seizure — Opposition — Sheriff—Return.]**—A seizure made under a writ issued in execution of a judgment obtained *ex parte* for \$500 damages

ceases to be valid and binding as soon as this judgment is reformed upon opposition to judgment by a second judgment maintaining the opposition; and the defendant-opponent is only bound under the seizure to the sum to which the judgment is reduced, in this case, \$50. Such a seizure having become effete cannot be continued upon the same writ for the latter sum; and the defendant may dispose of the immovable so seized notwithstanding the seizure after the judgment maintaining the opposition.—2. A writ of execution which has been returned by the sheriff to the Court upon service of a certificate of the filing of an opposition to the judgment cannot be withdrawn from the record of which it forms part in order to be sent to the sheriff with instructions to continue proceedings, without the authorization of the Court or a Judge. *Demers v. Dufresne*, 5 Q. P. R. 465.

**7. Seizure and sale—Opposition for payment — Bailiff's return — Default—Rule nisi.**—A bailiff who has seized and sold a debtor's property both at his domicile and place of business, and has received an opposition for payment on the moneys levied at either of these places, must return into Court all the moneys levied at that place, and make a separate return of his proceedings at both places, in order that the Court may adjudicate: in default of his so doing, a rule may be issued against him. *Lacroix v. Proulx*, 5 Q. P. R. 309.

**8. Seizure by way of security—Service—Return—Declaration.**—When a writ of *saisie-gagerie* is made returnable the second day after service, the declaration must be served at the same time as the writ.—2. When the service of the declaration is made at the office of the Court, there must be at least one clear day between the service and the return. *Dupuis v. Mathieu*, 5 Q. P. R. 414.

**9. Seizure for preservation of property—Declaration—Money in bank—Garnishment—Exception to form.**—A writ of *saisie-conservatoire* must be accompanied by a declaration or contain a sufficient statement of the grounds of the demand.—2. If the articles to be seized are not in specie, but sums of money in the possession of a bank, the creditor must proceed by way of garnishment, and not by *saisie-conservatoire*.—3. A *saisie-conservatoire* with respect to sums of money, and not accompanied by a declaration, will be dismissed upon exception to the form. *Leith v. Hall*, 5 Q. P. R. 155.

**10. Sheriff—Return—Reissue to another sheriff—Opposition—Sale of rail-**

**way.**—If the sheriff to whom a writ of execution is addressed makes a return of *nulla bona* and *nulla terre*, the prothonotary has no right to address the same writ to the sheriff of another district, by making an addition in the margin.—2. An opposition to the sale of a portion of a railway seized under a writ of execution will not be dismissed upon defence in law upon the ground that it is not formally alleged that the portion of the railway so seized does not constitute a section; that must be shewn by evidence. *Atlantic and Lake Superior R. W. Co. v. Dillon*, 5 Q. P. R. 191.

### III. PROPERTY LIABLE TO SEIZURE.

**1. Account book — Assignment of debts.**—A ledger or account book containing a list of debts which have been assigned in writing, and which are described in the writing as "all the debts in a certain ledger marked A," is a mere incident to the debts, and is no longer a chattel as it was before the entries were made in it. It is, therefore, not seizable in execution against a judgment debtor, the former owner of the debts, as against the person to whom they have been so assigned by him. *Corticelli Silk Co. v. Balfour*, 5 Terr. L. R. 385.

**2. Partnership property — Ownership of goods seized—Transfer to continuing partner — Sheriff — Proceeds of sale — Liability to execution creditor—Damages—Depreciation.**—A partnership existing between C. and S. was dissolved, C. taking all the assets and assuming all the liabilities of the firm:—*Held*, that, in the absence of fraud, the goods of the firm were effectually transferred to C., and were subject to an execution placed in the hands of the defendant sheriff with instructions to levy upon and sell the goods of C.—The defendant, after having levied upon the goods under the plaintiff's execution, sold the goods under two executions placed in his hands subsequently, and paid over the proceeds to the creditors at whose instance such executions were issued:—*Held*, that he was liable to the plaintiff in damages for so doing; but was not liable for depreciation resulting from delay in selling occasioned by the act of the Court.—The case was not one for punitive damages, or for other damage than the actual value of the goods at the time of the sale. *Crowe v. Buchanan*, 36 N. S. Reps. 1.

**3. Patent for invention.**—*Quære*, whether a patent for invention can be seized under execution. *Walker v. Lamoureux*, Q. R. 21 S. C. 492.

**4. Patent for invention.]**—A patent for invention granted by the Dominion Government may be seized in execution. *Farand v. Emond*, Q. R. 23 S. C. 2.

#### IV. SALE.

**1. Fixtures — Opposition—Appeal—Title of purchaser.]**—The appellants, a company having their place of business in the Province of Ontario, had sold certain machines to K. Bros., of Joliette, with a reservation of right of property. The mill in which these machines were installed having been seized with the machines at the suit of the curator under an assignment of K. Bros. for the benefit of creditors, and of a creditor of one of the insolvents, the appellants filed an opposition, which the respondent contested, and which the Superior Court dismissed. The appellants, nearly four months after the judgment of the Superior Court, appealed to the Court of Queen's Bench, which maintained the opposition; and this judgment was affirmed by the Supreme Court of Canada. However, in the interval between the judgment dismissing the opposition and the institution of the appeal, the creditor obtained from the prothonotary a writ of *ven. ex.*, and, through the agency of a person named by the respondent, the curator obtained from a Judge an order for the sale of the mill and the machines. The sale took place after the appeal, but the appellants knew nothing of it until after they had obtained the judgment of the Supreme Court, and at that sale the respondent became the purchaser of the mill and the machines, and subsequently disposed of them:—*Held*, that the respondent, whom the appellants had informed of their right of property in the machines and the nullity of the seizure which had been made of them, could not, by instigating the order and becoming the purchaser at the sale, obtain a title which would be good against the appellants, and that in disposing of the machines as things belonging to him, the respondent had made himself responsible to the appellants for their value. *Waterous Engine Works Co. v. Bank of Hochelaga*, Q. R. 12 K. B. 258.

**2. Goods—Opposition to sale—Notice—Parties—Debtor.]**—An opposition to the sale of movables will not be maintained unless notice of contestation has been given to the parties, including the debtor. *Valiquette v. Guibault*, 5 Q. P. R. 163.

**3. Goods not seized—Irregular sale—Acquiescence—Purchase in good faith.]**—A portion of a debtor's stock-in-trade

having been seized under a writ of execution, the bailiff, on the day fixed for the sale, added other goods of the debtor to the list of those seized, and, at the request of the debtor, who was desirous of repurchasing his stock-in-trade, sold the entire stock *en bloc*. The proceeds of the sale were distributed among the creditors in due course of law. The debtor having, shortly afterwards, made an abandonment of his effects, his curator, by the present action against the purchaser at the bailiff's sale, sought to have the sale annulled as irregular and void, and the goods returned, or their value paid to the plaintiff:—*Held*, that, although the sale was irregular, and improperly included goods which had not been seized or advertised for sale, yet the purchaser having acted in good faith and even offered to re-transfer the goods, the price being a reasonable one, and the proceeds distributed according to law, and the creditors, moreover, having suffered no injustice in consequence of the irregularity of the proceedings, the sale should not be annulled. *Bernier v. Dépocas*, Q. R. 24 S. C. 70.

**4. Lands—Collocation of hypothecary creditor—Right of execution debtor to contest—Conditional debt.]**—At the time of a sheriff's sale the judgment debtor has a right to contest the collocation of an hypothecary creditor, whose debt is conditional, and who is collocated as a simple creditor, inasmuch as, if the condition is not realized, the creditor will have received the money, and, not having furnished the security required from a conditional creditor, he will perhaps not be in a position to repay the amount which he has received. *Benoit v. Ste. Marie*, 5 Q. P. R. 222.

**5. Lands — Opposition—Contestation—Appeal—Sale under *ven. ex.*—Rights of purchaser.]**—The intervenant, the holder of a judgment against one V., having made a seizure under execution of an immovable of which V. was in possession, the plaintiff asserted an opposition *en fait d'annuler* against this seizure, alleging that she was the owner of the immovable by virtue of a sale made by V. to her, and her opposition was contested by the intervenant, who alleged that the sale by V. to her was fraudulent. The opposition was maintained by the Superior Court, but that judgment was reversed by the Court of Review, which dismissed the opposition, maintained the seizure, and ordered a sale of the immovable under writ of *ven. ex.* By virtue of this last judgment the intervenant advertised the sale of the immovable upon *ven. ex.*, and the sale took place and one C. became the purchaser. He sold to the defendant. After the sale under the *ven. ex.* but before the time for appeal had

expired, the plaintiff appealed from the judgment of the Court of Review to the Court of Queen's Bench, and, not wishing to give security for the costs of the appeal, signed the declaration required by Art. 1214, C. P. C., consenting to execution upon the judgment against her. The Court of Queen's Bench reversed the judgment of the Court of Review and restored that of the Superior Court. The plaintiff then brought the present action to recover the immovable sold, and the intervenant (the judgment creditor) intervened in this action and contested it:—*Held*, that the seizure having been made against one in possession *animo domini*, the sale, having taken place after the fulfilment of all the formalities required by law, and before the appeal of the plaintiff, was valid, and had wiped out the right of the plaintiff to the immovable itself, and left her only a claim upon the purchase money. *Renaud v. Denis*, Q. R. 23 S. C. 16.

**6. Lands — Priorities — Intervening transfer — Sale — Distribution of proceeds — Creditors' Relief Ordinance — *Ultra vires*.**—There having been lodged with the registrar a copy of *fi. fa.* lands in two several actions, with memoranda of the same land to be charged; the land standing in the defendant's name at the time of the lodging of the first *fi. fa.*, but having been transferred to and standing in the name of a purchaser from the defendant at the time of the lodging of the second execution, and the lands, having been sold under the first *fi. fa.*:—*Held*, following *Roach v. McLachlin*, 19 A. R. 496, and *Breithaupt v. Marr*, 20 A. R. 689, that the first execution creditor was entitled to the whole proceeds of the sale. The members of the Court were divided in opinion as to whether the Creditors' Relief Ordinance was *ultra vires* so far as it purported to affect executions against lands, as being inconsistent with the Territories Real Property Act. *Massey Manufacturing Co. v. Hunt*, *McCormick Harvesting Machine Co. v. Hunt*, 2 Terr. L. R. 84.

## EXECUTORS AND ADMINISTRATORS.

**1. Action against administrator — *Saisie-conservatoire* — *Saisie-arrest* before judgment.**—A writ of *saisie-conservatoire* can be issued only in the three cases mentioned in Art. 955, C. P.—2. In an action against the administrator of an estate there can be seized only the effects on which there is a lien, that is to say, the property of the estate, and not that of the defendant.—3. A writ of *saisie-arrest* before judgment cannot be issued

where the defendant conceals or withdraws not his own property but that of the estate which he has administered, even where the property of the defendant is for the most part if not entirely the property of the estate. *Turcotte v. Dumoulin*, 5 Q. P. R. 206.

**2. Administrators pendente lite — Investment of moneys — Trustee Act — Trustee Investment Act.**—The administrators *pendente lite* of an estate asked for an order declaring that they were empowered to invest moneys in their hands during the pendency of litigation concerning the will of the deceased, in securities authorized by the Trustee Investment Act. An action was pending in the High Court, in which the validity of the will was to be tried, and in the meantime the Surrogate Court appointed the executors administrators *pendente lite*. They had received a large amount of money, which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged:—*Held*, that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee Investment Act; and the order asked for was made. *In re Mackey*, 23 Occ. N. 115.

**3. Business carried on for benefit of estate under will — Liability of executor — Estoppel — Statute of Limitations.**—An estate of a deceased was being administered in this action commenced in May, 1892, and V. brought into the Master's office in 1901 a claim for goods supplied to the executor, between July, 1890, and March, 1892, for use in carrying on the hotel business of deceased under authority conferred by his will.—V. had, in May, 1893, sued the executor in a County Court for the price of the goods in question, but the County Court Judge dismissed the action, on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor claimed in the administration proceedings that the estate was insolvent, but in April, 1894, an order was made by consent for the transfer of all the assets to him personally, upon his undertaking to pay or settle with all the creditors of the estate and paying \$1,200 into the hands of trustees for the benefit of the children of the deceased and certain costs, and this order was carried out on both sides. The order contained provisions that the Master should forthwith adjudicate upon and settle all claims against the estate, that the executor should in-

demnify and save harmless the estate from all such claims, and that he should carry out and perform all the terms and provisions of the settlement:—*Held*, that a person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred: *In re Frith*, [1892] 1 Ch. 342; *Dowse v. Gorton*, [1891] A. C. at p. 199.—2. That the executor was estopped from disputing the claim against the estate.—3. That the claim was not barred by the Limitations Act. *In re Braun, Braun v. Braun*, 23 Occ. N. 96, 14 Man. L. R. 346.

**4. Claim by executor against estate—Matters occurring before death of deceased—Corroboration—Devise to executor—Whether in lieu of compensation—Negligent mismanagement—Compensation.]**—The executor of a deceased person's estate was also the executor of an estate in which the deceased was beneficially interested. In passing his accounts in respect to the last named estate, after the deceased's death, the executor credited himself with having received for the deceased on account of her share in such last named estate a specified sum of money. On subsequently passing his accounts in respect to the deceased's estate, and being charged with this sum, as having been received by him for the deceased, he alleged that he had not then received it, but had in fact paid it out in small sums to the deceased during her lifetime:—*Held*, that this was not a matter occurring before the death of the deceased, and therefore the evidence of the executor to establish his contention did not require to be corroborated under s. 10 of the Evidence Act, R. S. O. 1897 c. 61.—A testatrix by her will devised to her brother certain lands free from incumbrances, with a direction for the payment out of general personal estate of any incumbrance thereon, and she appointed him her executor:—*Held*, that the devise was not given to him in his capacity of executor, but in his personal capacity, and therefore did not preclude him from claiming compensation for his services to the estate.—*Compton v. Bloxham*, 2 Coll. 201, distinguished.—Where an executor has been guilty of acts of negligence, mismanagement, and breach of trust in his management of the estate, but there has been nothing of a dishonest or fraudulent character, and the losses resulting are capable of being compensated for, and made good in money, the executor is not to be deprived of compensation. *McClenaghan v. Perkins*, 23 Occ. N. 84, 5 O. L. R. 129.

**5. Evidence—Corroboration.]**—Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances. *In re Jelly, Union Trust Co. v. Gamon*, 23 Occ. N. 327, 6 O. L. R. 481.

**6. Official administrator — Heirs out of jurisdiction—Letters of administration.]**—The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the Province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property, although he died possessed of real estate within the Province subject to a mortgage. *In re Lelaire*, 9 Brit. Col. L. R. 429.

**7. Substitution—Power to sell property and reinvest—Mortgage by prev. Creditors—Attachment of debts.]**—The testator left his property to the defendant, subject to a substitution in favour of the children of the defendant, with a stipulation of *insaisissabilité*. The will, however, permitted the executors, of whom the defendant was one, to sell the property on condition of employing the moneys arising from the sale in the purchase of property of the same value as the property sold, the property so acquired to represent that sold. The defendant in 1869 sold one of the immovables of the estate, and in 1873 he bought in his own name a lot upon which he built a house. In 1895 he charged and hypothecated this land in favour of his children to the amount of \$10,440, which was the cost price, to serve and be instead of, as the deed said, a reinvestment for the children in accordance with the provisions of the will, up to the amount of the price so paid. The deed of hypothecation reserved to the defendant the right to remove the hypothec, and invest elsewhere, whether in purchasing new properties or upon other sufficient securities:—*Held*, that the deed of hypothec did not constitute a valid reinvestment of the moneys arising from the sale of the property of the estate, and that the revenues of the immovable acquired by the defendant in his own name could be attached by his creditors. *De Serres v. Leclaire*, Q. R. 23 S. C. 454.

See APPEAL, X. 6—ARREST, III. 7—ATTACHMENT OF DEBTS, I. 7—BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 17—DEVOLUTION OF ESTATES ACT—LIMITATION OF ACTIONS, II. 1—PLEADING, III. —VENDOR AND PURCHASER, 7—WILL.

### EXEMPTIONS.

See ASSESSMENT AND TAXES, IV. —COUNTS, V. 1 — EXECUTION, I. —FRAUDULENT CONVEYANCE, 1—MUNICIPAL CORPORATIONS, I. 5 —REVENUE, 5—SHIP, IV. 1.

### EXHIBITS.

**Filing—Letter—Original or copy.]—**A party who seeks to adduce in evidence a letter written by himself will not be ordered to file the original, that being in possession of the addressee. *Chaput v. Charland*, 6 Q. P. R. 33.

See COSTS, VIII. 4.

### EXONERETUR.

See ARREST, II.

### EXPENDITURE.

See MUNICIPAL CORPORATIONS, VIII.

### EXPERTS.

See COSTS, IX. 3—JUDGMENT, II. 8.

### EXPROPRIATION.

See CONSTITUTIONAL LAW, 5 —CROWN, II.—DAMAGES, 2—MUNICIPAL CORPORATIONS, IX. 1, XVI. 9 —RAILWAY, VII. 2, 3, 4 —TRESPASS TO LAND, 3.

### EXTRADITION.

**1. Habeas corpus — Desistment — New trial — Res judicata — Certiorari — Extradition commissioner — Jurisdiction — Warrant — Description of offence — Extradition treaties.]—**A writ of *habeas corpus*, in an extradition matter, issued upon the order of a Judge, then dis-

charged by the same Judge, does not prevent the issue of another writ and does not constitute *res judicata*, when: (a) there are new allegations in the petition upon which the second writ is issued; (b) the petitioner has desisted from his first writ before judgment and alleges this desistment in his second petition; (c) the second writ is not addressed to the same gaoler and is executed in a different district.—2. The petitioner may validly desist from a writ of *habeas corpus* at any time before judgment, and if, in spite of the desistment, judgment is rendered, it does not constitute *res judicata*, and cannot be set up against the second writ.—3. After the issue of a writ of *habeas corpus*, in an extradition matter, the Judge seized of the writ may issue a writ of *certiorari* in aid, addressed to the extradition commissioner who has issued the warrant, to return the whole of the proceedings before him, including the information or complaint and the documents relating to it.—4. In order to form an opinion upon the merits, the Judge, after the return of the proceedings under the *certiorari*, is not confined to the warrant of arrest, to see if the extradition commissioner had jurisdiction, but he may go behind the warrant and see what it is founded on.—5. An extradition commissioner has no jurisdiction to proceed to extradition, unless his warrant, as well as the documents upon which it issues, is legal and contains a legal description of an offence mentioned in the treaties.—6. In an extradition matter, the date of committing the offence is an essential element in the description of the offence, and if it is not in the warrant, the warrant is illegal.—7. The warrant, the complaint, and the documents relating to it, must shew clearly that the offence is within the treaties.—8. The extradition commissioner cannot in his warrant change the offence stated in the complaint so as to bring it within the treaty. *Re p. Gaynor and Greene*, Q. R. 22 S. C. 109.

**2. Locus standi in Court of foreign state — Commissioner of extradition — Jurisdiction — Interference by Judge—Habeas corpus—Committal—Territorial jurisdiction—Judge seized of case —Exclusion of other Judges.]—**Foreign sovereigns and States have the right to appear and intervene in cases before the Courts of the Province of Quebec.—2. A commissioner of extradition, acting under the authority of the Extradition Act, has equal authority with a Judge of the Superior Court; and it is only when, assuming to act as a commissioner, he does something which is *ultra vires*, or otherwise acts illegally, that Superior Courts, or Judges thereof, become seized with revisory, amendatory, or appellate powers

over his acts.—3. When a prisoner, whose extradition is sought, has been brought before a Judge of the Superior Court on a writ of *habeas corpus* issued before the committal of the accused and before the conclusion of the inquiry before the commissioner, the powers of the Judge are limited to determining whether the commissioner has jurisdiction to make the inquiry, i. e., whether he is legally seized of the case; when, however, the writ of *habeas corpus* was issued after the committal of the accused, the Judge has the power to review the case against him.—4. The jurisdiction of an extradition Judge or commissioner extends over the whole Province for which he has been appointed; he may therefore order a prisoner to be brought before him from any part of the Province in which he has been arrested.—5. A Judge of the Superior Court before whom a prisoner, whose extradition is sought, has been brought on a writ of *habeas corpus*, has absolute control over him until he has passed from the hands of such Judge; and until then no other Judge has the right to interfere in the matter by *habeas corpus* or otherwise. *In re Greene and Geynor*, Q. R. 22 S. C. 91.

### EXTRAS.

See CONTRACT, I.

### FACTORIES.

See MUNICIPAL CORPORATIONS, XI. 1—  
NUISANCE, 1, 2, 3.

### FACTORIES ACT, ONTARIO.

See MASTER AND SERVANT, II. 12.

### FALSE BIDDING.

See VENDOR AND PURCHASER, 6.

### FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION, 1.

### FALSE PRETENCES.

See CONVERSION—CRIMINAL LAW, II. 3.

### FAMILY COUNCIL.

See INTERDICT.

### FARM CROSSINGS.

See RAILWAY, III.

### FATAL ACCIDENTS ACT.

See DAMAGES, 4, 5 — MASTER AND SERVANT, II.

### FENCES.

**Line fence — Mitoyen—Ownership—Petitory action.**—Where a line fence is "mitoyen," that is to say, made and kept up by the neighbouring owners at their joint expense, it is generally divided into equal parts between the neighbours, each one being the sole owner and responsible for his part.—2. In such a case one neighbour has the right to bring a petitory action against the other, where the latter has taken possession of the part of the fence belonging to the other. *Provis v. Renaud*, Q. R. 23 S. C. 511.

See RAILWAY, IV.—WAY, I. 1.

### FERRY.

See CONSTITUTIONAL LAW, 2, 3—RAILWAY, VIII. 1.

### FINAL JUDGMENT.

See APPEAL, II. 7. VIII. 1. X. 7. 8. 11—  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—JUDGMENT, II. 7.

### FINAL ORDER.

See APPEAL, VII. 1—COMPANY, III. 2.

### FINES.

See LIQUOR ACT OF ONTARIO, 1—MUNICIPAL CORPORATIONS, XVI. 5.

### FIRE.

See LANDLORD AND TENANT, VII. 1—  
NEGLECT, 7.



**FIRE INSURANCE.**

See INSURANCE, II.

**FISHERIES.**

See MUNICIPAL CORPORATIONS, XVI. 4.

**FISHERIES ACT.**

See CRIMINAL LAW, II. 4.

**FIXTURES.**

**1. Hypothecation as attached to land — Separation and sale — Rights of hypothecary creditor — Preferential claim.**—An hypothecary creditor has a right to be paid in preference to ordinary creditors, according to the order of his hypothec, out of the proceeds of sale of movable articles, immovable by destination and hypothecated as such, sold at a judicial sale as movables separated from the property to which they were attached, subject to his hypothec. *McCaskill v. Richmond Industrial Co.*, Q. R. 23 S. C. 381.

**2. Machinery — Conditional sale — Lien of manufacturers. — Rights of mortgagee — Priorities — Statute — Retroactivity.**—A woollen company purchased from the plaintiffs, on the instalment plan, a steam engine under an agreement in writing which provided that it should not become the property of the vendee until the payment of all the instalments, and should be removable by the vendor on failure of the vendee to pay as agreed. The engine was affixed to the freehold of the vendee by bolts and screws to iron plates embedded in concrete to prevent it from rocking and shifting, and might have been removed at any time without injury to the freehold. It was used for driving the machinery in the factory of the vendee. Default having been made in the payment of the instalments, the engine was claimed by the vendor and also by the defendant, a mortgagee of the land on which the mills were situate and all the mill plant, engines, etc., who took his mortgage after the engine had been installed and without notice of the plaintiffs' claim. The mortgage was foreclosed by the defendant, and the mortgaged property was bought in by him under a sale in equity, for an amount less than the mortgage debt. The plaintiffs were not parties to the foreclosure proceedings, but were aware of the pendency of the same. No report of the sale or motion to confirm

was made:—*Held*, that the engine was sufficiently annexed to the land to become part of the freehold, and passed to the defendant under his mortgage.—By the mortgage to the defendant the engine passed as part of the realty, and on his taking possession, if not by virtue of the mortgage alone, all right in the plaintiffs to retake it was put an end to.—The Act 62 V. c. 12, s. 8, s.s. 2, which provides that where goods or chattels are sold on the instalment or hire and purchase system, and the property is not to pass until payment, the right of the owner shall not be affected by such goods or chattels being affixed to the realty, does not apply to past transactions where the goods had been affixed to and become part of the realty before the passing of the Act. *Goldie and McCulloch Co. v. Hewson*, 35 N. B. Repts. 349.

**3. Suspensive conditional sale—Replevin — Title — Registration.**—In order that movable property placed on real property for a permanency and incorporated therewith, should become immovable by destination, the ownership as well of the movable as the immovable upon which the former is placed, must be vested in the same person.—2. Movable property which, had it been owned by the proprietor of the real estate upon which it was placed, would have become immovable by destination, may, even after a sheriff's sale of the immovable while the movable property was so attached to it, be revindicated by its owner.—3. The title to such movable property preserved under a suspensive conditional sale providing that the ownership shall not pass until full and final payment of the price, and that the property shall not become immovable until that time, and with a stipulation that any money paid on account shall be imputed as rent, is, without registration, a valid and sufficient title. *Leonard v. Willard*, Q. R. 23 S. C. 482.

See EXECUTION, IV. 1.

**FORECLOSURE.**

See MORTGAGE, 1.

**FOREIGN CHATTEL MORTGAGE.**

See BILLS OF SALE AND CHATTEL MORTGAGES.

**FOREIGN COMMISSION.**

See EVIDENCE, IV.

**FOREIGN COMPANY.**

See COMPANY, IV. 2—WRIT OF SUMMONS, I. 2.

**FOREIGN JUDGMENT.**

See JUDGMENT, I.

**FOREIGN LAW.**

See SOLICITOR, 3.

**FOREIGN VESSEL.**

See SHIP, I. 2.

**FORFEITURE.**

See COURTS, VIII.—CROWN, III. 2—DEED, 1—INSURANCE, III. 7. 8—LANDLORD AND TENANT, III. 9—PILOTS, 2—SPECIFIC PERFORMANCE, 3.

**FORGERY.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 8, 9—CRIMINAL LAW, III. 1—LAND TITLES ACT.

**FRANCHISE.**

See COMPANY, IV. 4—CONSTITUTIONAL LAW, 6.

**FRAUD AND MISREPRESENTATION.**

**Contract — Rescission — Mining lease.**—The defendant, by falsely stating to the plaintiffs that he had obtained a lease of a similar mica property from another proprietor for \$30 per ton on the mica extracted, which statement he supported by producing a pretended copy of the lease in his own writing, induced them to lease their mica property to him on the same terms. The plaintiffs would not have agreed to the lease but for the deceit practised:—*Held*, that the representation that the defendant had obtained a lease of a similar property for \$30 per ton, being a principal consideration for entering into the contract, the plaintiffs were entitled, under Arts. 992 and

993, C. C., to obtain its rescission. *Barnard v. Riendeau*, 31 S. C. R. 234, followed. *Doucet v. Clerex*, Q. R. 23, S. C. 107.

See BANKRUPTCY AND INSOLVENCY, I. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 8, 9—DISCOVERY, I. 2—EVIDENCE, I. 7—HUSBAND AND WIFE, II. 1, X. 2—LAND TITLES ACT—LIEN, 4—LIMITATION OF ACTIONS, II. 1—MORTGAGE, 3—PARTICULARS, 10—PARTNERSHIP, 5—PLEADING, I.—SALE OF GOODS, V. 4—VENDOR AND PURCHASER, 8.

**FRAUDULENT CONVEYANCE.**

**1. Exemptions — Lien of registered judgment — Taking proceedings under, while debtor in occupation — County Courts Act — Judgments Act.**—The registration of a certificate of judgment, under ss. 196 and 197 of the County Courts Act, R. S. M. c. 33, as amended by 55 V. c. 7, s. 5, binds and charges the land of the judgment debtor, though it may be his actual residence or home, and the creditor may take proceedings to realize whenever the defendant ceases to be entitled to claim the property as his exemption. *Frost v. Driver*, 10 Man. L. R. 319, 15 Occ. N. 169, followed.—2. When a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim that the land is an exemption of his under s. 12 of the Judgments Act, R. S. M. c. 80, can no longer be maintained. *Brimstone v. Smith*, 1 Man. L. R. 302, and *Massey-Harris Co. v. Warrener*, not reported, followed.—3. Under such circumstances, when the debtor has made a conveyance of his home, which is fraudulent against creditors under 13 Eliz. c. 5, the creditor is entitled to an immediate order for sale of the property to realize the amount of the judgment and costs. *Taylor v. Cummings*, 27 S. C. R. 592, distinguished. *Roberts v. Hartley*, 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

**2. Insolvency — Knowledge — Action to set aside—Parties—Consideration.**—The notorious insolvency of a debtor is not sufficient ground upon which to set aside his deed, if he was not aware of the insolvency, and if the one to whom he conveyed was not aware of it.—2. A deed cannot be set aside as made in fraud of creditors of the grantor unless all the parties to the deed are before the Court.—3. Want of consideration in a sale of lands is evidence of simulation and nullity of the sale. *Connolly v. Bois des Chaleurs R. W. Co.*, 5 Q. P. R. 353.

**3. Insolvency — Right of repurchase — Pledge.]**—A pretended sale by an insolvent, who keeps possession of the articles sold and reserves the right of re-purchasing them within a certain time, is void as constituting a pledge without dispossession; and in any event such sale is void as being fraudulent. *Edgerton v. Lapierre*, 5 Q. P. R. 389.

**4. Voluntary Mortgage — Subsequent transfer to creditor — Pressure — Consideration—Priorities — Future support of grantor — Statute of Elizabeth.]**—In 1877 C. made a conveyance, by way of mortgage, to H. The conveyance was made without consideration, and in fraud of creditors, and was voidable as against creditors and subsequent purchasers for valuable consideration.—In 1896 H., at the request of C., assigned the mortgage so made to W., who was a creditor of C., and pressing for payment:—*Held*, that the mortgage, although fraudulently made in the first instance, was validated by the assignment to W. for valuable consideration; that the giving of time by W. to C. in connection with the antecedent indebtedness, was sufficient consideration to support the assignment. But the validating of the mortgage would not affect the right to priority of the party claiming under a second mortgage made by C. previously to the assignment of W.:—*Held*, also, following *McNeil v. McPhee*, 31 N. S. Reps. 140, that a deed made by C., the sole consideration for which was the future support of the maker and his wife by the grantee, was not founded upon valid consideration, within the Statute of Elizabeth. *Conrad v. Corkum*, *Whitford v. Corkum*, 35 N. S. Reps. 288.

See ATTACHMENT OF DEBTS. I. 6—PLEADING, II. 2.

## FRAUDULENT PREFERENCE.

**1. Judgment — Attack on — Time.]**—A judgment, and the judicial hypothec thereby created upon the property of the debtor, while he is insolvent, and with the intention of obtaining a fraudulent preference over other creditors of the debtor, may be attacked within the time mentioned in Art. 1040, C. C.—2. A judgment is a judicial contract.—3. The time for contesting the fraudulent act of a debtor runs not only from the date of the distribution of his property, establishing his insolvency, but from the date of the knowledge of the fraud by the creditor, that is to say, from the prejudice which the fraudulent act causes him. *Banque Nationale v. Common*, Q. R. 22 S. C. 284.

**2. Simulated sale of chattels — Presumption—Pledge.]**—Although a sale of movable effects may be perfect without delivery, the want of *déplacement* gives rise to the presumption that the sale was simulated.—2. The laws of the Province of Quebec do not permit chattel mortgages, and, in a prominent degree, refuse recognition of subterfuges whereby a creditor may secure advantages at the expense of his fellow-creditors. — 3. Where it appears that a pretended deed of sale, without any delivery having taken place, is, in reality, an unlawful pledge of the movables affected, such deed will be annulled. *In re Goyer*, Q. R. 21 S. C. 502.

## FUTURE RIGHTS.

See COURTS, IX. 3, 5, 6.

## GAMING.

See APPEAL, I. — BROKER — CRIMINAL LAW, II. 6—LIQUOR LICENSE ACT, V.

## GARNISHMENT.

See ATTACHMENT OF DEBTS.

## GAS WORKS.

See COMPANY, IV. 4, 5.

## GIFT.

**1. Donatio mortis causa—Deposit receipts — Cheques and orders—Delivery for beneficiaries — Corroboration—Construction of statute.]**—McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000, which he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother, and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for \$2,000 each, payable out of the deposit receipt, to the respective beneficiaries, which McD. signed and returned to his brother, who handed to McD.'s wife the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards:

—*Held*, affirming the judgment in 35 N. S. Reps. 205, *SEDGEWICK* and *ARMOUR, JJ.*, dissenting, that this was a valid *donatio mortis causa* of the deposit receipt and the sum it represented, notwithstanding that there was a small amount for interest not specified in the gift.—By R. S. N. S. 1900 c. 163, s. 85, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife, or both, unless it is corroborated by other material evidence:—*Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. *McDonald v. McDonald*, 23 Occ. N. 135, 33 S. C. R. 145.

**2. Donatio mortis causa — Evidence — Money and notes — Delivery of keys of box.**—The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, retired to his room and lay down on his bed, and while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, and said, "All the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk.—There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant. She retained the keys until his death.—In an action by the administrators of his estate for the money and notes:—*Held*, that there was a good *donatio mortis causa*.—*In re Mustapha, Mustapha v. Wedlake*, 8 Times L. R. 160, followed. *Charlton v. Brooke*, 23 Occ. N. 286, 6 O. L. R. 87.

**3. Donatio mortis causa—Savings bank deposit — Delivery of pass book—Evidence — Corroboration.**—The money at the credit of a savings bank depositor may pass as a *donatio mortis causa* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book.—Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causa*; that is, any evidence which is believed and is corroborated as required by the statute may be acted upon. *In re Reid*, 23 Occ. N. 334, 6 O. L. R. 421.

**4. Donatio mortis causa—Solicitor and client — Absence of independent advice — Invalidity of gift — Corroboration.**—*Held*, per *Moss, C.J.O.*, and

*GARROW, J.A.*, that where, at the time of the making of an alleged *donatio mortis causa*, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift could not be supported; *MACLENNAN, J.A.*, dissenting. Per *OSLER, J.A.*—Apart from the question of confidential relationship, the plaintiff's testimony as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death had not been corroborated by some other material evidence, as required by s. 10 of the Evidence Act. *Davis v. Walker*, 23 Occ. N. 83, 5 O. L. R. 173.

**5. Marriage portion — Renunciation of right to benefit from parent's estate — Heirship.**—Under the old law, as under the Civil Code, it was possible, in a contract of marriage, for the future wife, receiving a dowry from her father and mother, to renounce her right to any benefit from their estates.—2. This right of *légitime* continued to exist in the Province of Quebec until the date of the Civil Code, but it cannot, since the introduction of the unlimited power of disposing of property by will, be exercised to the prejudice of testamentary dispositions.—3. In order to have a right to *légitime*, the person claiming it must be an heir; to renounce *légitime* is to renounce right of succession.—4. The plaintiff, by a marriage contract made in January, 1853, having accepted certain gifts from her father and mother in lieu of her share in their future succession, thereby renounced in advance her right of succession to her father and mother, and it was held that she could not now claim anything from their estates, since she was not an heir. *Duval v. Fortin*, Q. R. 23 S. C. 392.

**6. Replevin — Concubinage — Partners — Pleading.**—To an action for replevin of goods the subject of a gift, the defendant may plead that one of the donors was living in concubinage with the donee at the time of the gift.—2. The defendant will not be allowed to plead as against the donee that the gift is void because made by the donor in order to escape his creditors.—3. In replevying articles given by a partnership, it is not necessary to make all the partners parties if a single one of them is detaining the articles in question.—4. The defendant cannot plead to a *saisie-revendication* that other creditors are claiming the

right to the same articles.—5. *Prouve avant faire droit* will be ordered where the donor alleges that he has sold the articles replevied with the assent of the donee. *Rousseau v. Verdon*, 5 Q. P. R. 219.

**7. Revocation — Ingratitude — Arrest of donor by donee — Judgment in slander.**—A donee, who causes to be imprisoned, under a judgment for damages for slander, one of the donors, an old man of 83 years of age and in bad health, thus separating him from his wife, the other donor, also ill, where the donors, who have given all the property they possess, have nothing to pay the damages except an alimentary pension, insaisissable and hardly sufficient for their subsistence, which the donee allows them under the terms of the gift, is guilty of ingratitude which has the effect of revoking the gift. *Depatie v. Charbonneau*, Q. R. 22 S. C. 80.

**8. Simulated donation — Execution against donor — Opposition—Contestation by creditor — Claim arising after gift.**—Where the donor does not intend to give and does not divest himself of the thing given, and the donee does not intend to receive the thing as a gift, there is no real donation, and Art. 1039, C. C., does not apply—this Article applying only where there is a real contract, and not where the contract is simulated. The thing which is nominally given may be seized, therefore, as being still in the possession of the donor.—2. A person who only becomes a creditor subsequent to the execution and registration of a simulated deed of donation of movables by his debtor, may nevertheless allege and invoke the fact of simulation, in his contestation of an opposition, based on such pretended deed of donation, made to a seizure effected by the creditor. *Lighthall v. O'Brien*, Q. R. 6 S. C. 159, approved. *Sienwain v. Roque*, Q. R. 23 S. C. 115.

**9. Undue influence — Confidential relations — Evidence — Parent and child — Public policy — Principal and agent.**—The principle that, where confidential relations exist between donor and donee, the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by shewing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for the benefit of the latter's children, when the son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the

donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later, and by voluntarily paying it before he died, such presumption does not arise.—Judgment of the Court of Appeal, 2 O. L. R. 251, 21 Occ. N. 493, reversing that of a Divisional Court, 31 O. R. 414, 20 Occ. N. 65, affirmed. *Trusts and Guarantee Co. v. Hart*, 23 Occ. N. 36, 32 S. C. R. 553.

See ATTACHMENT OF DEBTS, I. 5—DEED, 3—DOWER, 2—HUSBAND AND WIFE, II. 1, V. 1, 2, 3, IX. 3, 6—INFANT, 4—INSURANCE, III. 9—MUNICIPAL CORPORATIONS, XIV. 2—PARTNERSHIP, 5—REVENUE, 4—WILL.

## GOLD COMMISSIONER.

See APPEAL, X. 11—WATER AND WATER-COURSES, 9, 10.

## GRAND JURY.

See CRIMINAL LAW, III. 5, 8.

## GUARANTY.

See PRINCIPAL AND SURETY, 1.

## GUARDIAN.

See BANKRUPTCY AND INSOLVENCY, I.—EXECUTION, II. 2—INFANT, 4, 5, 7—OPPOSITION, 5—WRIT OF SUMMONS, I. 5.

## HABEAS CORPUS.

See ALIENS—CONTEMPT OF COURT, 1—EXTRADITION—INFANT, 1—LIQUOR ACT OF ONTARIO, 3.

## HARBOUR.

See CONSTITUTIONAL LAW, 2—JUSTICE OF THE PEACE, 2.

## HARBOUR COMMISSIONERS.

See PILOTS, 3.

**HAWKERS.**

See MUNICIPAL CORPORATIONS, XV.

**HIGH COURT OF JUSTICE FOR ONTARIO.**

See COURTS, VI.

**HIGHWAY.**

See CONSTITUTIONAL LAW, 3 — MUNICIPAL CORPORATIONS, VII. 1, IX.—WAY.

**HIGHWAY CROSSINGS.**

See RAILWAY, V.

**HIRE RECEIPT.**

See SALE OF GOODS, II. 1.

**HOLIDAY.**

See ARREST, I.

**HOMESTEAD.**

See EXECUTION, I. 1, 2.

**HOUSE OF COMMONS.**

See CONSTITUTIONAL LAW, 4.

**HUSBAND AND WIFE.**

I. ALIMONY.

II. COMMUNITY.

III. DISSOLUTION OF MARRIAGE.

IV. LIABILITY OF HUSBAND.

V. MARRIAGE CONTRACT.

VI. PARTIES TO ACTION.

VII. SEPARATION DE CORPS.

VIII. SEPARATION OF PROPERTY.

IX. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

X. OTHER CASES.

See APPEAL, VIII. 1—ATTACHMENT OF DEBTS, I. 6 — BANKRUPTCY AND INSOL-

VENCY, I. 18—CONTEMPT OF COURT, 2—CRIMINAL LAW, I. 1, II. 2—DISTRIBUTION OF ESTATES, 3, 6 — DOWER — EVIDENCE, III.—GIFT, 5—MARRIAGE—OPPOSITION, 1—PRINCIPAL AND AGENT, 5.

**I. ALIMONY.**

1. *Divorce suit — Evidence of husband.*]—In a suit for divorce and alimony the respondent, the husband, is not a competent witness on the question of alimony. *Norton v. Norton*, 23 Occ. N. 17.

2. *Husband without means.*] — A husband, who is not able to earn his own living and who has no income beyond what will barely support him, will not be ordered to pay an alimentary allowance to his wife. *Dupuis v. St. Mars*, 5 Q. P. R. 404.

3. *Interim alimony — Action for separation—Desertion.*] — A wife, sued for *séparation de corps*, who, without the authorization of the Court, has left the conjugal domicile, has no right to an alimentary allowance from her husband pending the action. *Protain v. Prévoist*, Q. R. 23 S. C. 8.

4. *Multiplication of actions.*]—If a husband has sued his wife in separation from bed and board, and recovered judgment in his favour, while a similar action by the wife is still pending, the latter, who has demanded a *pension alimentaire* in her action, will not be permitted to bring a new action for alimony, as she can obtain such alimony in the case already pending. *Hainault v. Bêland*, 5 Q. P. R. 382.

See post III. 1.

**II. COMMUNITY.**

1. *Gift by husband to child—Fraud on wife.*]—A gift of the property of the community made by the husband in favour of one of the children of the marriage cannot, whatever the advantages which the gift confers upon the child, even to the prejudice of the other children of the marriage, constitute a fraud as against the wife so as to enable her to claim that the gift shall be set aside as a nullity. *Jodoin v. Birtz*, Q. R. 22 S. C. 443.

2. *Rights of wife — Pleading—Demurrer.*]—A wife common as to property has no right of action to reclaim rights which belong to the community.—2. The

proper procedure to have an action dismissed as regards her, is by demurrer, and not by exception to the form. *Desrouard v. Fortier*, 5 Q. P. R. 230.

See post III. 1, IV. 4, V. 3, VII., VIII.

### III. DISSOLUTION OF MARRIAGE.

**1. Ecclesiastical decree—Effect of—Civil consequences—Community—Alimony—Custody of child—Maintenance—Costs of action.**—In spite of an ecclesiastical decree declaring a marriage invalid on account of a relationship in the fourth degree between the contracting parties, in respect of which there has been no dispensation, the civil consequences of the marriage continue until a judgment of a civil Court declares it void. Therefore, pending a suit by the husband against the wife to have the marriage declared void, the husband and wife continue to be regarded as such in their civil relations, the community stipulated for in the marriage contract continues to exist, and the husband continues to be obliged to support his wife.—2. A child being born of such marriage, after the canonical decree and after the husband and wife have ceased to live together, and such child being only a few months old, the wife, who naturally has the guardianship and care of the child, has a right, without being appointed guardian, to obtain from the husband, pending the suit, a proper provision for the child.—3. The wife has also the right to obtain from the husband alimony for herself pending the suit.—4. She has also the right to obtain from the husband, head of the community stipulated for in the marriage contract, a provision for her costs of a defence in good faith to the action. It is for the plaintiff, as head of the community, to defray all the expenses of the action both on his own part and on the part of the defence; such expenses are a charge upon the community. *Levesque v. Ouellet*, Q. R. 22 S. C. 181.

**2. Foreign divorce—Invalidity—Service on wife.**—In a suit to declare void a marriage contracted by a woman who had obtained in the United States of America a divorce from her first husband, upon the ground that such divorce is void, that question cannot be decided upon an exception to the form alleging that the service of process was illegal and that the woman should have been served as the wife of the first husband. *Stephens v. Müller*, 5 Q. P. R. 397.

### IV. LIABILITY OF HUSBAND.

**1. Debts of wife—Costs—Application by husband for custody of children.**—Where a wife leaves her husband without justification, she is not entitled against him to her costs of unsuccessfully resisting his application by *habeas corpus* for the custody of the children of the marriage. *In re McPhalen*, 10 Brit. Col. L. R. 40.

**2. Debts of wife before marriage—Married Women's Property Act—Property acquired from wife—Evidence—Deductions.**—The Married Woman's Property Act, R. S. N. S. 1900 c. 112, s. 25, makes a husband liable for the debts of his wife contracted by her before marriage "to the extent of all property whatsoever belonging to the wife which he has acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him" in respect to any such debts, etc.—In an action against the defendant R. for goods supplied to his wife before marriage, evidence was given by the plaintiff's solicitor to shew that on the examination of the wife before a commissioner, the defendant R. was present and stated, among other things, that he had received from his wife three promissory notes, for amounts and due at dates which he mentioned:—*Held*, that the evidence was not admissible, the best evidence being that taken down by the commissioner, and which he was required to return to the Court.—2. That there was nothing in the evidence to bring the notes referred to within the language "property belonging to the wife" which the defendant had "acquired or become entitled to" through the wife, or to discharge the burden resting upon the plaintiff to shew acquisition or title by or in the husband,—*Seemle*, where money was received and payments made by the husband, that the plaintiff would have to shew a balance remaining in his hands, and that he could not put in one side of the transaction without the other. *Bauld v. Reid*, 36 N. S. Reps. 127.

**3. Goods ordered through wife—Acknowledgment—Domicil—Change.**—Assuming that the defendant and wife were separated as to property, the fact that the household linen goods in question were purchased on the credit of the husband and for him, although charged in an existing account against the wife, was sufficiently established by proof of his knowledge of the transaction throughout, his personal visit to the vendor, his furnishing a sketch of his own family crest to be embroidered on the linen, by his

promise to pay for the goods on arrival, and by a letter to the vendor's attorneys in which he stated that he had authorized the insurance of the goods at his own expense, and further said, "I do not see why I should be called upon to pay him (the vendor) until I have received the goods and checked them off before a linen expert, etc."—2. Change of domicile from Montreal to New York is not legally established by the fact that a person born in Montreal, and having his domicile there, went to New York and married there, and subsequently lived in New York State for a time with his mother-in-law, and at a hotel, and then in a furnished house in New Jersey. There must be actual residence in the place selected, coupled with the intention of the person to make it the seat of his principal establishment: *Art. 80, C. C. Calcutt v. Tiffin*, Q. R. 23 S. C. 175.

**4. Torts of wife — Community — Participation—Defamation.]**—A husband in general is not responsible for the torts or quasi-torts committed by his wife, nor is the community responsible for them.—2. There is no exception to this rule except when the husband has acted as his wife's accomplice or has participated in the tort or quasi-tort by having aided, ordered, or authorized her.—3 In this case (slander), the husband having ordered his wife to be silent and to go into the house as soon as he understood what she was saying, there was no fault or complicity on his part, and, therefore, no responsibility of the husband or of the community for the wrong committed by the wife. *Fortier v. Demers*, Q. R. 21 S. C. 543.

That, in the circumstances, the husband was right in bringing his action against both his wife and her father. *Goyette v. Leclerc*, Q. R. 23 S. C. 542.

**2. After-acquired property—Contestation of opposition — Donatio mortis causa.]**—A gift to the wife of all the household furniture in the dwelling-house of the husband and wife is a gift of property present and future, which is not a gift *mortis causa*, but which takes effect at any time, and there is nothing illegal or immoral about it.—2. It may be alleged in answer to the contestation of an opposition, based upon such a gift, that certain of the effects were bought by the husband after the marriage for his wife to replace like effects which had been sold, this answer being an explanation of an allegation of the opposition raised by the contestation. *Allan v. Trihey*, 5 Q. P. R. 298, Q. R. 24 S. C. 12.

**3. Universal community — Don mutuel—Registration.]**—A marriage contract contained a clause whereby the contracting parties made to each other a mutual gift of all the property which might belong to the one who should die first "*en jouir en usufruit sa vie durant à sa caution juratoire et gardant viduité.*" The only property affected belonged to the community:—*Held*, that the donation was within Art. 1411, C. C., and did not require registration, as the clause was divisible, and the stipulation as to universal community merely a marriage covenant, and not subject to the rules and formalities applicable to gifts. Judgments in Q. R. 21 S. C. 341 and 12 K. B. 44, affirmed. *Huot v. Bienvenu*, 33 S. C. R. 370.

See post IX. 2.

## V. MARRIAGE CONTRACT.

**1. After-acquired property—Donatio mortis causa—Separation—Replevin—Parties.]**—A marriage contract stipulated that "all the furniture which should be brought at any time into the dwelling-house of the future husband and wife, by either one of them, should belong to the future wife." *A séparation de corps* having been adjudged between the husband and wife, the wife, accompanied by her father, went to the house of the husband, and removed the furniture, which she alleged belonged to her by virtue of the clause above quoted, and this furniture was transferred to the house of her father, where she lived. The husband replevied the furniture in an action brought against the father and daughter:—*Held*, that the clause quoted constituted a gift of future property, *mortis causa*, and, therefore, the furniture remained the property of the husband until his death.—2.

## VI. PARTIES TO ACTIONS.

**1. Action against wife—Authorization—Service on husband.]**—A married woman, whose husband, made a party for the purpose of authorizing her, has not been served, may have the action dismissed with costs upon exception to the form delivered by her after having been judicially authorized to appear before the Court.—2. The plaintiff in such a case will not be permitted afterwards to serve process in the action upon the husband so made a party. *Jarvis v. Allaire*, 5 Q. P. R. 316.

**2. Action by wife—Position of husband—Judgment for separation of property—Default in execution—Exception to the form.]**—Where, in an action by a married woman, her husband is made a



party only to authorize and assist her, conclusions demanding a judgment in favour of "the plaintiffs" must be interpreted as if they read "the plaintiff" only.—2. It is for a defendant who sets up default in the execution of a judgment ordering separation of property alleged by the plaintiff, to shew, upon his exception to the form, such default in execution. *Drolet v. Bélanger*, 5 Q. P. R. 312.

**3. Authorization of wife—Declaration of widowhood—Estoppel—Husband actually alive.]**—Want of authorization of a wife under the control of her husband as a party to a suit is a nullity which nothing can cure, and of which all those who have any interest existing and actual may take advantage.—2. In this case, although the defendant passed for a widow, and although she had called herself a widow in certain deeds and writings, such action on her part did not modify her absolute incapacity to be a party to a suit without authorization, where she swore that her husband was still alive, and the plaintiff had not proved that he was dead. Judgment in Q. R. 21 S. C. 566 reversed. *O'Malley v. Ryan*, Q. R. 23 S. C. 94.

**4. Marriage of woman pendente lite—Rights of husband.]**—If, during the pendency of a suit, a woman who is a party to the suit is married, with a settlement under which her property is to be separate from that of her husband, the husband may obtain leave to take part in the suit for the purpose of authorizing his wife, but not on his own behalf. *Toupin v. Boule*, 5 Q. P. R. 137.

**5. Negligence—Injury to wife.]**—An action for damages for injuries caused to a married woman, common as to property, must be brought by her husband alone, and the action will, upon demurrer, be dismissed as to the wife if she is made a plaintiff. *Major v. Paquet*, 6 Q. P. R. 20.

**6. Slander of wife—Sole right of husband to sue.]**—In the case of community of goods, the husband has the sole right of action for recovery of damages for slander of his wife.—2. The wife cannot be joined with the husband in the institution of the action, even if the latter acts in his personal capacity and not solely to authorize her; and upon demurrer, the demand of the wife will be dismissed. *Caron v. Larivé*, 5 Q. P. R. 332.

See MUNICIPAL CORPORATIONS, XVI. 2.

## VII. SEPARATION DE CORPS.

**1. Action for — Trial—Reconciliation—Preliminary hearing.]**—Where, in

an action for *séparation de corps*, the parties have, with the assent of the Court, divided the hearing to allow one of the parties, who alleges a reconciliation, to prove the facts constituting it, reserving the right to prove the other facts alleged by the parties, after adjudication upon the reconciliation, the opposite party will not be permitted to reopen the hearing to prove facts having nothing to do with the reconciliation before adjudication by the Court upon this first question. *Christin v. Lafontaine*, 5 Q. P. R. 198.

**2. Grounds—Insanity.]**—The fact that the husband is insane and unable to receive or provide for his wife is not a ground for separation from bed and board. *Deneen v. McLeod*, 5 Q. P. R. 391.

**3. Judgment for separation de corps—Effect as to dissolution of community—Default of execution—Right to allege.]**—The separation of property which follows upon a *séparation de corps*, is without effect if it has not been executed in the manner provided by Art. 1098, C. P.; and the inefficiency of a judgment to dissolve the community may be pleaded as well by the husband and wife as by their creditors. *Lafleur v. Morin*, Q. R. 21 S. C. 483.

**4. Right of husband to aliment.]**—A merchant sued for *séparation de corps*, may claim from his wife an alimentary pension if the latter has been put in possession of the business from which the former obtained his means of subsistence. *Joly v. Garneau*, 5 Q. P. R. 137.

See ante I. 3. V. 1.

## VIII. SEPARATION OF PROPERTY.

**1. Administration of wife's property by husband — Warrant of administration — Alienation by husband—Replevin by wife.]**—A wife, separate as to property, may replevy her goods without the authorization of her husband.—2. A warrant of administration given by a wife, separate as to property, to her husband, does not give him the right to alienate the goods.—3. The husband, although he may be, in certain cases, the administrator of the property of his wife, separate as to property, has no right to alienate them without an express warrant. *Beaulac v. Lupien*, Q. R. 23 S. C. 88.

**2. Execution of judgment — Renunciation of community—Registration—Creditors of husband.]**—A judgment for

separation of property is sufficiently executed by the declaration of the wife, given effect to by the judgment, that she has no rights or remedies to exercise against her husband, but the separation of property takes effect against third persons only from the time of the judgment, and the wife can only, as against them, set up her renunciation of the community from the time of the registration of such renunciation. Therefore, a contract made by a married woman, before the execution of the separation of property and the registration of her renunciation, is made for the benefit of the community, and sums due by virtue of such contract may be attached by the creditors of the husband. *Bérard v. Magnan*, Q. R. 22 S. C. 217.

**3. Pleading — Particulars — Judgment—Estoppel.** — Community of property between husband and wife is the general rule under the law of the Province of Quebec, and separation of property the exception. Therefore, a party setting up a judicial separation of property must indicate in his pleading where and when the judgment for separation was rendered, and this under the penalty of being afterwards estopped from setting up such judgment. *Gravel v. Cardinal*, 5 Q. P. R. 165.

See ante VI. 2.

## IX. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

**1. Execution against husband—Business carried on in wife's name—Simulation.** —The opposant, the wife of the defendant, had registered a notice that she was carrying on business as a decorative artist (which was the defendant's business) under the firm name of F. E. M. & Co., and in this capacity she maintained an opposition to a seizure of goods at the place where the business was carried on. It was proved that at the time of the registration the opposant had no money and that she had since acquired none by her own work, and that the goods seized had been bought with the moneys earned by the work of the defendant, who carried on the business under a power of attorney from his wife:—*Held*, that the alleged firm was simply a *prête-nom* for the defendant, who was the true owner of the goods seized, and that the opposition should be dismissed. *Décary v. Meloche*, Q. R. 21 S. C. 486.

**2. Execution against husband—Opposition by wife—Usufruct—Marriage contract—Subsequently acquired goods—Evidence.** —A wife, being the usufructuary of the furniture of a house, has a

right to make an opposition to the sale of the furniture where it is demanded by the creditors of the husband.—2. This usufruct ceases, however, with the disappearance of the goods, and does not extend to furniture bought in renewal of that which was subject to the usufruct and has been worn out by use.—3. An opposition to the sale of a piano, which the opposant alleges was given to her, will be dismissed if the evidence shews that the piano was bought by the husband of the opposant, who gave her in payment therefor an old piano, and that the opposant lent to her husband the money necessary to pay the difference in price.—4. It is for the opposant, who alleges that she has bought goods of which she claims the possession, to prove that the money which went to pay for such goods was her own; if she has mixed money which came to her from her relatives with that coming from her husband, she cannot maintain that the goods are not the property of her husband. *Walker v. Massey*, 5 Q. P. R. 369.

**3. Gift from husband—Change of possession—Execution creditor—Seizure in conjugal domicile.** —Interpleader issue. The defendant purchased certain pictures, and, bringing them home, handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother; and all three were hung up in the house occupied by her and her husband. Some six or seven years afterwards an execution creditor of the defendant caused the sheriff to levy on these pictures:—*Held*, that since the Married Woman's Property Act, 1884, R. S. O. 1897 c. 163, s. 3, a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and in this case the subsequent possession of the pictures was the wife's, although the house was occupied by her husband and herself:—*Held*, also, that the effect of s. 4 of s. 5 of R. S. O. 1897 c. 163, whereby it is enacted that a married woman married since 4th March, 1889, may hold her property free from the debts or control of her husband, "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts. This sub-section must be read in connection with s. 3, a.s. 1, and a wife is placed precisely in the position of a *feme sole* with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such purpose here. *Stat-*

*Heworth v. McGillivray*, 23 Occ. N. 153, 5 O. L. R. 536.

**4. Loan to wife — Benefit of husband—Hypothecation of wife's property—Void contract—Duty of lender to see to application.]**—Where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to shew that the money, although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, in order to bring the contract within the prohibition of Art. 1301, C. C.—2. The law does not require that the person from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the money for the purposes of the wife. Even in the case of a deception by the wife, as to the use to which the money is to be applied, the contract of loan is nevertheless null. *Trust and Loan Co. v. Kerouack*, Q. R. 12 K. B. 281.

**5. Loan to wife—Benefit of husband—Security by sale of land with right of redemption—Void contract—Knowledge of lender.]**—A loan contracted by a wife separate as to property—the security for the loan being given in the form of a sale with right of redemption of her immovable property, instead of in the form of a hypothecation—is null and void as contrary to the prohibition contained in Art. 1301, C. C., where the proceeds of such loan are to be used, with the knowledge of the lender, for the exclusive benefit of the husband. Judgment in Q. R. 20 S. C. 320 reversed. *Kerouack v. Gauthier*, Q. R. 12 K. B. 295.

**6. Purchase of land by husband—Conveyance to wife—Presumption of gift—Resulting trust—Onus—Married Woman's Property Act—Moneys expended by husband—Equity to compensation—Property acquired by wife during coverture—Tenancy by the curtesy.]**—Where a husband, in the management of his wife's property, of which he is receiving the benefit, purchases certain freehold lots with his own money, with a view of improving his wife's estate, and takes conveyance in her name, the purchase money is not a charge upon the property, and as between husband and wife the presumption is that a gift was intended, unless displaced by evidence necessary to establish a resulting trust in his favour. The onus is upon the husband of establishing a resulting trust in his favour in land purchased by him in the name of his wife.—The changed condition in the husband's status brought

about by the Married Woman's Property Act, 58 V. c. 24 (N.B.), by which the marital rights of a husband in his wife's property have been materially curtailed, does not given him an equity to be compensated for the purchase of the surrender of leases of property of which the wife has acquired a reversionary interest, and for moneys expended in making useful and necessary repairs upon the leasehold premises. The effect of the surrender is a merger of the outstanding term of years in the greater estate.—A woman, married before the passing of the Act, may make a conveyance, without her husband's concurrence, of her real estate not acquired from him during coverture, subject, however, to his tenancy by the curtesy consummate.—A married woman can not, during her husband's lifetime, transfer either the title or possession of property acquired from her husband during coverture. *De Bury v. De Bury*, 36 N. S. Reps. 57.

## X. OTHER CASES.

**1. Abandonment of wife—Replevin of household goods.]**—In a *saisie-revendication* the plaintiff will not be put in possession of the goods seized when it appears that they are in the possession of the intervenant, his wife, whom he has abandoned, and that the place where the effects are is the domicile of the husband and wife, where the intervenant lives with her children. *Beauchamp v. Beauchamp*, 5 Q. P. R. 307.

**2. Conveyance before marriage—Fraud on marital rights—Testamentary dispositions—Wills Act.]**—The plaintiff was engaged to be married to J. C. A. in November, 1900. The marriage took place on the 4th December, 1901. The husband died on the 26th January, 1902. In August, 1901, the deceased secretly executed a conveyance of all his real estate to the defendant, and this conveyance was not recorded until a few days before the marriage. Late in November, 1901, the deceased also assigned his securities to the defendant. The plaintiff had no knowledge of these conveyances at the time of the marriage, and only learned definitely about them after her husband's death. She thereupon brought an action to have the instruments set aside, (1) as having been made in fraud of her marital rights, and (2) as not having complied with the provisions of the Wills Act. The trial Judge found that the transfers were made with the distinct object of preventing the plaintiff from enjoying any portion of her husband's estate after his death, and that the deceased deceitfully concealed from

his intended wife before and after their marriage the fact that he had stripped himself of his property. The Judge decided, however, that the instruments were not testamentary, and that the plaintiff was not entitled to the relief claimed:—*Held*, that conversations with the deceased were admissible, not to derogate from the transfers, but to shew the design of the deceased. Under English law the wife is not entitled to relief against conveyances made in fraud of her marital rights, though the rule is different in the United States. There was nothing to indicate that the operation of the instruments was to be suspended until the grantor's death. *Archibald v. Archibald*, 23 Occ. N. 121.

### HYPOTHEC.

See ASSESSMENT AND TAXES, II. 2, 3—BANKRUPTCY AND INSOLVENCY, II.—EXECUTION II. 5. IV. 4—EXECUTORS AND ADMINISTRATORS, 7—FIXTURES, 1—HUSBAND AND WIFE, IX. 4—INFANT, 4—INTEREST, 3—OPPOSITION, 10—RAILWAY, I. 2—SHIP, III. 2—SUBROGATION—VENDOR AND PURCHASER, 11, 12.

### ILLEGAL FISHING.

See CRIMINAL LAW, II. 4.

### IMPORTING ALIEN LABOURERS.

See CRIMINAL LAW, II. 5.

### IMPROVEMENTS.

See ASSESSMENT AND TAXES, VII. 1, 4—CONSTITUTIONAL LAW, 2—CROWN, II. 2, III. 6—WAY, II. 1—WILL, II. 11.

### INCIDENTAL DEMAND.

See PLEADING, V.

### INDEMNITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—DISCOVERY, I. 5—MASTER AND SERVANT, II. 1—PRINCIPAL AND AGENT, 4.

### INDIAN.

**Intoxicating Liquor—Sale—Knowledge of licensee — Half-breed.]**—Section 94 of the Indian Act (R. S. C. 1886 c. 43) provides that "Every person who sells, exchanges with, barter, supplies or gives to any Indian or non-treaty Indian, any intoxicant . . . shall on summary conviction . . . be liable to imprisonment for a term not exceeding six months:"—*Held*, following *Regina v. Howson*, 1 Terr. L. R. 492, that a half-breed who has "taken treaty" is an Indian within the meaning of the Indian Act. A conviction of a person licensed to sell liquor, for the sale of an intoxicant to such half-breed was, however, quashed, because the licensee did not know and had no means of knowing that the half-breed shared in Indian treaty payments.—*Mens rea* must be shewn. *Regina v. Mellon*, 22 Occ. N. 343, 5 Terr. L. R. 301.

See CRIMINAL LAW, II. 9.

### INDIAN LANDS.

**Assignment of timber—Interest in land—Registration—Conditional assignment—Priorities—Actual notice.]**—The owner of unpatented Indian lands administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R. S. C. c. 43, made a sale of certain timber thereon and executed an assignment or transfer to the vendee, by which the vendor agreed to sell and the vendee to purchase all the timber of a certain specified kind upon the land described, for a named price, payable as set out, and by which the vendee was "to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term:"—*Held*, that the interest assigned was an interest in land, and not a mere chattel interest.—*Summers v. Cook*, 28 Gr. 179, and *Ford v. Hodgson*, 3 O. L. R. 526, followed.—*Held*, also, that the assignment was not an unconditional assignment within the meaning of s. 43 of the Indian Act, and was incapable of being registered in the manner prescribed by the Act, and therefore did not require registration to preserve its priority, and was entitled to priority over a subsequent registered assignment.—*Harrison v. Armour*, 11 Gr. 303, followed.—*Scoble*, that, although there is no provision in the Indian Act as to "actual notice," the law laid down in *Agra Bank v. Barry*, L. R. 7 H. L. at pp. 147, 148, would apply if the subsequent assignee had at the time of the registration such

notice of the prior assignment. *Bridge v. Johnston*, 23 Occ. N. 287, 6 O. L. R. 370.

See CONSTITUTIONAL LAW, 7.

## INDUSTRIAL HOME.

See STATUTES.

## INFANT.

**1. Custody — Rights of father — Habeas corpus.**—A writ of *habeas corpus* will not be maintained to permit a father, being without means, to get back his daughter, 14 years of age, who is living with her grandfather, and desires to continue to live with him. *Robert v. Veronneau*, 5 Q. P. R. 426.

**2. Custody of illegitimate child — Rights of mother — Judicial discretion — Abandonment of child — Agreement.**—Application by the mother for the custody of an illegitimate child, a boy 12 years of age. The mother, who was only 17 when the child was born, was unable to support him, and arranged with S. to take the child, and he had been with S. ever since. At the time she gave the child to S. she executed a document which set forth that she "doth hereby give, grant, release, and abandon unto the said party of the second part forever her said male child and all her right and title as the mother of the said child to the custody, control, and possession of said child from henceforth." S. on his part agreed that he would maintain, care for, and educate the child:—*Held*, that the application should be refused. The interests of the child would be better served by leaving him with S. than by handing him over to his mother. The right of the mother to the custody of the child cannot be regarded as an absolute one, and the Court has full authority to consider the best interests of the child: *Regina v. Nash*, 10 Q. B. D. 454; *Barnardo v. McHugh*, [1891] A. C. 388.—The agreement the mother made with S. to make over the child to him was not one that could be legally enforced against her, even if she had been of age when she executed it: *Andrews v. Salt*, L. R. 8 Ch. 622. *In re Slater*, 23 Occ. N. 337.

**3. Examination for discovery — Discretion of examiner — Capacity of infant.**—An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery.—*Arnold v. Playter*, 14 P. R. 399, approved.—An order for the examination of an infant

for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself. *Flett v. Coulter*, 23 Occ. N. 43, 4 O. L. R. 714.

**4. Gift of property subject to charge—Tutor of infants—Retrocession to donor — Hypothecation—Invalidity — Rights of creditor.**—R. gave his property to his son on condition that he would pay the donor's then existing debts. The donee died shortly afterwards, leaving a widow and two children (minors). The widow and children went to the United States to live. A tutor *ad hoc* was appointed to the children, and he retroceded the property to the donor, who borrowed \$500 from the plaintiff, hypothecating the property as security. The widow of the donee remarried, and she and her husband took possession of the property as tutors of the children. The donor subsequently died, and the plaintiff sued the donee's children, as represented by their tutors, to recover the \$500 with interest:—*Held*, that the retrocession of the property of the minors to the donor and its hypothecation by him were illegal.—2. The donee's minor children were not liable to the plaintiff for the repayment of his loan to the donor.—3. The payment of the \$500 to the donor did not enrich the minors, but simply operated a change in their creditor.—4. The plaintiff's remedy was an action against the representatives of the donor, and an attachment in the hands of the defendants, as tutors of the children, of what they might owe to the donor, who paid debts for which they were liable. *Beaumont v. Lamond*, Q. R. 23 S. C. 139.

**5. Guardian—Removal — Grounds.**—If on any ground, a tutor can be deprived, even temporarily, of the guardianship of his wards, it will only be for grave reasons. *Fitz Allan v. Ricurd*, 5 Q. P. R. 387.

**6. Mortgage — Voidable contract — Repudiation of — What amounts to — Infants' Contracts Act.**—*Held*, that a mortgage executed by an infant before the passing of the Infants' Contracts Act is not void but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age.—R., in 1896, being then an infant, executed a mortgage in favour of S., the plaintiff. R. came of age on the 27th January, 1900, and at that time.

on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mortgage. R.'s solicitors on the 13th February, 1900, wrote S., saying that no valid mortgage had ever been executed by R., and threatening proceedings to protect their client's interests, and on the 2nd March they began an action on behalf of R. against S. for a declaration that the mortgage was null and void and an injunction restraining the sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction, he said in substance that the reason he did not pay was because he couldn't, and that he had never repudiated his contract, and in October, 1900, he discontinued his action. On the 2nd November, 1900, S. commenced his foreclosure action, and in defence R. pleaded infancy: — *Held*, that the solicitor's letter and the writ in *Russell v. Saunders* did not constitute a repudiation, as they were qualified by R.'s statement that he did not intend to repudiate. *Saunders v. Russell*, 23 Occ. N. 56, 9 Brit. Col. L. R. 321.

**7. Tutor—Appointment of—Pleading—Exception.**—In an action brought by a tutor, *ex-qualité*, the fact that the plaintiff has not been regularly appointed tutor to the minor whom he assumes to represent, must not necessarily be pleaded by exception to the form, but may be set up in a plea to the merits. *Dini v. Canadian Construction Co.*, 5 Q. P. R. 447.

See DOWER, 1—HUSBAND AND WIFE, III. 1, IV. 1—NEGLIGENCE, 1, 2—PARTITION, 2—WILL, I. 2—WRIT OF SUMMONS, I. 5.

## INFORMATION.

See MANDAMUS, 2.

## INJUNCTION.

**1. Interim injunction—Breach of contract to sell goods to plaintiff only—Remedy in damages.**—A contract recited that the plaintiff, in conjunction with others, was forming a company to be incorporated, and that the plaintiff was desirous of purchasing bricks for the benefit of the proposed company, and set out the intention of the plaintiff to assign all his interest in the contract to the company upon its incorporation, and stipulated that, upon such assignment, the company should be substituted for the plaintiff in the contract, and the evi-

dence shewed that the defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the company and its interest in the proposed purchases were material parts of the arrangements. The statement of claim in each case alleged that, relying upon the contract and upon the supply of bricks under it, the plaintiff, together with others, entered into a number of building contracts requiring the use of bricks, that the plaintiff would require for the purposes of his business during the present year all the bricks called for by the said contract, that the plaintiff and the company were tendering for and expected to obtain a large number of other building contracts requiring bricks, that the plaintiff expected to sell bricks to other builders at a profit, and that, unless the defendants supplied the bricks called for by the contract, it would be impossible for the plaintiff to get bricks in time to carry out these contracts, or to complete the works in the manner and within the time mentioned in said contracts.—The evidence adduced supported these statements in the main, but did not shew that the contracts referred to had been made for the benefit or on behalf of the company or that the company had acquired any interest or incurred any liability in respect of them: —*Held*, that the plaintiff should, under the circumstances, be left to his claim for damages, if any, arising from the alleged breach of the contract, and that interim injunctions should be dissolved. *Cass v. Couture, Cass v. McCutcheon*, 23 Occ. N. 249, 14 Man. L. R. 458.

**2. Interim injunction—Condition—Security—Time.**—Where a party has obtained an interlocutory injunction on condition of furnishing security, the Court may by a subsequent judgment fix a time within which security must be furnished under penalty of the dissolution of the injunction granted. *Moore v. Bullock*, 5 Q. P. R. 464.

**3. Interim injunction—Cutting timber on disputed land—Finding of jury in replevin action.**—An *ex parte* injunction to restrain the defendants from cutting timber and removing timber already cut, on lands, the title to which was claimed by the plaintiff and defendants by possession, was dissolved, where a jury in an action of replevin by the plaintiff to recover timber cut by the defendants on the land, had found in their favour, though a motion for a new trial was undisposed of. *Wood v. Leblanc*, 23 Occ. N. 157, 2 N. B. Eq. Reps. 427.

**4. Interim injunction—Dissolution before hearing—Assessment of damages.**

—Where an *ex parte* injunction was dissolved before the hearing of the suit, which was for a declaration of title to land, the Court postponed assessing the defendant's damages upon the plaintiff's undertaking given on obtaining the injunction, to the hearing of the suit. *Mollan v. Turner*, 23 Occ. N. 268.

**5. Interim injunction — Refusal — Discretion — Appeal.]** — Although the Court of King's Bench sitting in appeal has power to overrule the discretion exercised by the Court of first instance in refusing a petition for an interim injunction, it is a power which will be used only in an extreme case, where the right of the petitioner is clear and unmistakable, and where there has been manifest error in refusing his application. *South Shore R. W. Co. v. Grand Trunk R. W. Co.*, Q. R. 12 K. B. 28.

**6. Interim injunction—Rule as to granting—Facts in dispute—Partnership—Receiver.]**—On a motion for an interlocutory injunction to restrain defendant from disposing of assets of an alleged partnership between him and the plaintiff to carry on a business previously conducted by the defendant, and for a receiver, the plaintiff alleged that books of account were opened up, and a bank account kept, in the firm's name; that bill heads with the name of the firm, and names of the plaintiff and defendant thereon, were used, and a circular under the firm name distributed by the defendant, announcing that the plaintiff was associated in the business. The defendant denied that a partnership was formed, and alleged that it was contingent upon the plaintiff paying into the business a sum of money equal to the value of the defendant's stock-in-trade on hand; that this had never been done; that the plaintiff was employed at a weekly salary; and that the bill heads were ordered by the plaintiff without authority, and their use only permitted after his assurance that he would shortly purchase an interest in the business. These allegations were denied by the plaintiff:—*Held*, that the motion should be granted.—On a motion for an interlocutory injunction, the Court should be satisfied that there is a serious question to be determined, and that under the facts there is a probability that the plaintiff will be held entitled to relief. *Burden v. Howard*, 2 N. B. Eq. Reps. 461.

**7. Interim injunction—Threatened injury to property — Discretion — Affidavits in reply—Non-disclosure of material facts—Offer—Costs.]**—1. When evidence is given to the satisfaction of the Judge that there is a strong proba-

bility of injury to the plaintiffs' building by the continuance of blasting operations for the loosening of frozen earth on adjoining land, it is proper, on motion to continue an *ex parte* injunction, to grant an interlocutory injunction restraining the contractor until the hearing of the action from carrying on such blasting in such a manner as to injure the plaintiffs' building, although there is no proof that any actual injury to such building has already resulted.—*Fletcher v. Bealey*, 28 Ch. D. 688, and *Attorney-General v. Manchester*, [1893] 2 Ch. 87, followed.—2. There is a discretion in the Judge on the hearing of such a motion to allow affidavits in reply which contain statements going merely to strengthen the original case; and, when an opportunity is given to the defence to answer the affidavits in reply, the full Court on appeal will not interfere with such discretion.—*Peacock v. Harper*, 7 Ch. D. 648, followed.—3. The non-disclosure of material facts on the application for an *ex parte* injunction for a limited time, although a ground for discharging it, will not necessarily disentitle the plaintiffs to succeed on a motion to continue the expiring injunction when both sides present their cases fully; and the Court is not bound to specifically discharge the interim injunction or to award costs to the defendants.—4. An offer or suggestion on the part of the plaintiffs, before commencing the action, to accept a bond to secure them against damages caused by the operations complained of, even if distinctly proved, would not necessarily preclude them from claiming an injunction afterwards, though it would be a fact to be taken into consideration in determining whether a remedy by action for damages would not be adequate.—*Wood v. Sutcliffe*, 2 Sim. N. S. 168, distinguished.—5. Costs of appeal were ordered to be paid by the appellant in any event. *Miller v. Campbell*, 23 Occ. N. 233, 14 Man. L. R. 437.

**8. Obstruction of river—Removal—Dismissal of suit—Costs—Assessment of damages—Remedy at law.]**—The plaintiff was prevented from driving his lumber down a tributary of the Saint John river by the closing of the passage by a pier and boom erected by the defendant in connection with his saw mill, and by logs of the defendant. The defendant was the owner of both sides of the river. This suit was for a mandatory injunction to compel the removal of the pier, booms, and logs so as to open up and to keep open a passage for the plaintiff's lumber, and for an assessment of damages. The bill was filed and motion heard on the 23rd May, two days before the passage had been opened:—*Held*,

that the injunction in respect of future obstruction should be refused, and the plaintiff left to recover his damages, if any, in an action at law, but that the bill should be dismissed without costs; the plaintiff to have costs of obtaining and serving an interim injunction obtained in the matter. *Watson v. Patterson*, 23 Occ. N. 268.

**9. When granted — Irreparable wrong—Remedy in damages—Landlord and tenant.]**—There is no ground for the issue of a writ of injunction except when the wrong caused to the party claiming it is serious and irreparable and when such party has no other remedy in law to obtain reparation.—2. The lessee of part of a building, who complains that the owner in altering another part of the building troubles him in his enjoyment, has a remedy in damages against him, as well in virtue of the relationship of landlord and tenant as of the relationship between neighbours, and in consequence he has no right to a writ of injunction. *Poulos v. Scroggie*, 6 Q. P. R. 1.

See ASSESSMENT AND TAXES, I. — CONTEMPT OF COURT, 3—COPYRIGHT, 1—COSTS, VI. 9, 11, VII. 12—COURTS, IV. —COVENANT IN RESTRAINT OF TRADE, 1, 2, 3—MUNICIPAL CORPORATIONS, VIII. 3, XI. 1, XIV. 2, XVI. 8—PARTNERSHIP, 7—RAILWAY, V. 2, VII. 2—TRADE MARK—TRIAL, III. — WATER AND WATER-COURSES, 4—WRIT OF SUMMONS, I. 10.

## INLAND REVENUE ACT.

See REVENUE, 3.

## INSCRIPTION.

See NOTICE OF INSCRIPTION—TRIAL, I.

## INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

## INSPECTION.

See DISCOVERY, II. 5 — MINES AND MINERALS, 1.

## INSURANCE.

I. ACCIDENT.

II. FIRE.

III. LIFE.

IV. MARINE.

See ARBITRATION AND AWARD, 2—BENEFIT SOCIETY—BILLS OF EXCHANGE AND PROMISSORY NOTES, 9—COSTS, VI. 12—DAMAGES, 4—MUNICIPAL CORPORATIONS, IV. 1—PENALTIES AND PENAL ACTIONS, 1—PRINCIPAL AND AGENT, 2, 3—RAILWAY, II. 2—RECEIVER—SHIP, I. 1—TRIAL, II. 8.

I. ACCIDENT.

**Proofs of loss—Sufficiency—Waiver—Death by accident—Finding of jury.]**—Judgment in 22 Occ. N. 280, 4 O. L. R. 146, affirmed. *Ocean Accident and Guarantee Corporation v. Fowle*, 33 S. C. R. 253.

II. FIRE.

**1. Agreement as to loss—Refusal to arbitrate—Adjustment—Conditions of policy—Waiver—Evidence.]**—By a contract of insurance against fire made between the plaintiff and defendants, it was provided that in case of disaster the amount of the damages should be determined by agreement between the company and the assured, or by arbitration; that the assured should, whenever demanded, produce for examination to any person appointed by the company anything which remained of the insured property damaged or not damaged; that he should also produce for examination his books, invoices, or other papers, or certified copies if the originals were destroyed; that the company should not be considered to have waived any condition unless the waiver should be clearly expressed in writing and signed by an agent of the company. A fire having partly destroyed the insured property, the manager of the defendants himself visited the place, and the plaintiff having proposed to him to submit the settlement of his indemnity claim to arbitrators, the manager answered that he did not wish to have arbitration, and asked the plaintiff to prepare for him a statement of his loss and send it to him, adding that if it was satisfactory he would pay it. He told him at the same time that he could clean up the place and continue his business. The plaintiff prepared a statement, and, at the re-



quest of the manager, made his claim in writing. The manager submitted this claim to adjusters, and they went to the premises of the plaintiff to make an examination of his losses, but the plaintiff refused to shew them the damaged goods, which were for the most part still in his possession, saying that everything had been cleaned up and that no further statement of the damages could be made. The defendants then refused to pay, but did not allege that the account of the plaintiff was too large; and it was justified by the evidence:—*Held*, that the contract of insurance being in its nature commercial, oral evidence was admissible to prove the facts; and to do so was not to let in evidence to contradict a writing or to violate the condition of the policy which required a waiver in writing of the conditions of the contract, for the policy provided for a settlement by agreement, and the plaintiff was able to prove such agreement by witnesses.—2. In view of the refusal of the manager of the defendants to submit the settlement of the claim to arbitrators, and his proposition that the plaintiff should himself prepare a statement of his loss, the plaintiff could not be required to exhibit to the adjusters the damaged goods. *Duffy v. St. Laurent Fire Assurance Co.*, Q. R. 23 S. C. 181.

**2. Application—Untrue statement—Materiality—Statutory condition.**—In an application for insurance against fire, to the question "Have you ever had any property destroyed by fire?" The applicant answered, yes. "Give date of fire, and, if insured, name of company interested." Ans. "1892. National and London and Lancashire." The evidence shewed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance granted on this application was on property which replaced that destroyed by the latter fires:—*Held*, reversing the judgment in 35 N. S. Reps. 488, that the above questions were material to the risk, and the answers untrue. The first statutory condition, therefore, precluded recovery on the policy. *Western Assurance Co. v. Harrison*, 33 S. C. R. 473.

**3. Cancellation—Notice—Statutory conditions.**—The insured sent to the company his policy with an indorsed surrender clause executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire:—*Held*, that the letter did not take

effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt that the attempted surrender did not operate, and therefore the company were liable for the loss. Judgment in 22 Occ. N. 258, 4 O. L. R. 123, affirmed. *Skellings v. Royal Ins. Co.*, 23 Occ. N. 294, 6 O. L. R. 401.

**4. Mutual plan—Annual renewal—Proposal for increased premium—Non-acceptance—Condition of payment in advance—Delivery of receipt—Waiver.**—The judgment of STREET, J., 22 Oct. N. 295, 4 O. L. R. 303, affirmed on the ground that there had been no renewal contract of insurance. *Doherty v. Millers and Manufacturers Ins. Co.*, 6 O. L. R. 78.

**5. Void policy—Renewal—Mortgage clause.**—By s. 167 of the Ontario Insurance Act, a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy:—*Held*, reversing the judgment of the Court of Appeal, 3 O. L. R. 127, 21 Occ. N. 582, and restoring that at the trial, 32 O. R. 369, 21 Occ. N. 124, GIROUARD J., dissenting, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval. *Per GIROUARD, J.*, that the renewal was a new contract, which was avoided by non-disclosure of the concealment in the application for the original policy.—The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured," &c., applies only to acts of the mortgagor after the policy comes into operation, and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy.—*Quære*: Would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? *Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.*, 23 Occ. N. 133, 33 S. C. R. 94.

### III. LIFE.

**1. Action on policy—Condition as to award—Application to stay proceedings.**—In an action on a policy on which was indorsed a condition, that, in case

any question should arise, "it is a condition of this policy which the assured by the acceptance thereof agrees to abide by . . . every such difference shall be referred to the arbitration and decision of a neutral person . . . and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable . . . and it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided also that compliance with the stipulations indorsed hereon is a condition precedent to the right to recover on this policy," etc.—*Held*, that no action lay, nor did the amount payable under the policy become due, until the determination of the arbitrator to be appointed under the agreement to refer contained in the condition; that the plaintiff could not claim under the policy without assenting to its terms; and that the condition was not in contravention of s. 80 of R. S. O. c. 203.—*Spurrer v. LaClosche*, [1902] A. C. 446, followed. *Nolan v. Ocean Accident and Guarantee Corporation*, 23 Occ. N. 187, 5 O. L. R. 544.

**2. Benefit society — Beneficiary—Designation — Alteration — Privileged class.]**—The designation of a beneficiary in an Ontario contract of insurance can be revoked and the benefit diverted to another only within the limits laid down by the Ontario Insurance Act, R. S. O. 1897 c. 203, s. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reserved, and to the by-laws of the insurers, which permit the desired change. Thus, in such a case, the attempted diversion of the benefit from a beneficiary of the privileged class to a beneficiary not of that class was held invalid by reason of s. s. 3 of s. 151. *Lints v. Lints*, 23 Occ. N. 242, 6 O. L. R. 100.

**3. Benefit society — Certificate — Legal heirs designated by will—Election.]**—A certificate issued by a benevolent society to a married woman on the 25th October, 1892, provided that the benefit was to be payable to her "legal heirs as designated by her will." She died on the 14th November, 1892, leaving her husband and three children her surviving. By her will, dated the 30th September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying thereout all debts due by me,"

and the residue to her children:—*Held*, that the bequest of the insurance money to the executors was inoperative: that it was payable to the three children as "legal heirs designated by will," and that the children were not bound to elect between the benefits specifically given to them and the insurance money. *Griffith v. Howes*, 23 Occ. N. 169, 5 O. L. R. 439.

**4. Delivery of policy — Time — Operation of conditions — Incontestability.]**—An application for life insurance, dated 16th September, 1894, and made part of the contract, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof, and that the place of contract for all purposes should be the head office at Toronto. The policy issued provided that it should not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that it was delivered at Toronto on the 27th September, 1894. The insured lived in British Columbia. The policy and receipt were mailed at Toronto on the 27th September, 1894, to the company's agent at Winnipeg and forwarded by him on the 1st October to the insured, who could not have received it before the 7th October. The insured died on the 30th September, 1897. The policy provided that, after being in force for three years, it should be indisputable. The insured violated a condition that would have avoided the policy but for this clause:—*Held*, that the policy and receipt were delivered and the contract of insurance completed on 27th September, 1894, and was indisputable three days before the insured died. The provision as to indisputability covered a breach of condition made during the three years. *North American Life Assurance Co. v. Elson*, 33 S. C. R. 383; *Elson v. North American Life Assurance Co.*, 9 Brit. Col. L. R. 474.

**5. Misstatement in application as to age—Evidence of bona fides—Admissibility—Burden of proof—Findings of jury.]**—In an action on a policy of life insurance a defence was that the insured in his application, made in 1891, stated that he was 41 years of age, whereas in fact he was 44. The evidence shewed that 44 was his actual age at the time. Evidence of statements made by the insured, many years before the application, tending to shew his belief that he was born in 1850, was rejected:—*Held*, that the evidence should have been admitted for the purpose of shewing that the statement in the application as to age was made in good faith, and without intention to deceive.—In answer to ques-

tions the jury found that the statement in the application that the insured was born in 1850, was untrue, and was material, but that the insured made the misstatement in good faith, believing it to be true, and without intention to deceive:—*Held*, that on these answers judgment should have been entered for the defendants, if the jury could not properly find that the statement was made in good faith and without intent to deceive; but, as the plaintiff was not allowed to elicit evidence on this point, there should be a new trial.—Where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intent to deceive; and it must lie upon the person seeking to uphold the contract to make proof of it. *Dillon v. Mutual Reserve Fund Life Association*, 23 Occ. N. 86, 5 O. L. R. 434.

#### 6. Payment of overdue premium

—*Acceptance—Consent—State of health of assured.*—Where, by the conditions of a policy of life insurance, the non-payment of a premium when it falls due renders a policy void, and where it is also declared that no premium in arrear will be accepted by the insurance company unless with the consent in writing of the president, vice-president, or secretary, the acceptance of a premium, after it was due, and the sending of a receipt signed by the secretary, are equivalent to the consent required to validate the late payment of the premium.—2. The fact that the assured was dying when the premium in arrear was paid, the insurance company not having inquired as to his state of health, and no false representation as to it having been made, does not invalidate the payment. *Page v. Metropolitan Life Ins. Co.*, Q. R. 23 S. C. 503.

#### 7. Promissory note given for premium

—*Right to recover on, notwithstanding forfeiture—Consideration.*—An application for a policy of life insurance in the plaintiff company contained the following provision: "In consideration of the acceptance of this application and the expense incurred in connection therewith, I will accept said policy, when issued, and pay the first annual premium thereon, and if any note . . . or renewal or renewals thereof, given for the first or any subsequent premium, or any part thereof, be not paid when due, any policy issued hereunder will cease to be in force without any notice or action on the part of the company, but nevertheless the liability to pay such note . . . shall continue

and be enforceable, provided the company will revive the policy in its terms, on production of satisfactory evidence of continued good health."—A promissory note, given by the defendant, for one-half of the premium on the policy issued by the plaintiff company, was not paid at maturity, and the company notified the plaintiff that the policy was forfeited, and made an entry to that effect on their books.—It appearing that, in addition to the considerations mentioned in the application, the defendant had been insured for at least five months:—*Held*, that there was valuable consideration for the note, and that the plaintiffs were entitled to recover upon it.—The effect of the words in the application "provided the company will revive," etc., was merely to signify the terms upon which a policy forfeited under the rules of the company could be revived, and formed an agreement on the part of the company independent of the payment of the premium. *Home Life Association v. Walsh*, 36 N. S. Reps. 73.

#### 8. Promissory note given for premium

—*Right to recover on, notwithstanding forfeiture—Consideration—Verdict of jury.*—Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy; and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorized agent; also, that if a promissory note or obligation were given for the premium, and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note; the Court refused to set aside a verdict for the agent of the company on the note, on the ground that there was no consideration, holding that the defendant (appellant) was bound to shew affirmatively that the verdict was wrong. *Crawford v. Sipprell*, 35 N. B. Reps. 344.

#### 9. Transfer of policy—Gift—Civil Code.

—The provisions of the Civil Code as to gifts *inter vivos* and their acceptance do not apply to transfers of life insurance policies. *Montreal Coal and Towing Co. v. British Empire Mutual Life Assurance Co.*, 5 Q. P. R. 302.

### IV. MARINE.

**Re-insurance** — *Salvage*—"Special charges"—*Contribution* — *Constructive total loss.*—The plaintiffs, having in-

sured a large number of cattle and sheep, for the voyage from Montreal to Manchester, re-insured part of the risk with the defendants—the re-insurance policy or certificate containing the following clause:—"Insured against absolute total loss of vessel and animals, but to pay general average, and *special charges*." The ship carrying the animals struck a reef, and was finally abandoned three weeks later. In the meantime, part of the animals had been landed on an island, whence they were carried to Halifax and other places. The amount payable for salvage of the live stock so transported was fixed at one-third of the gross proceeds of the sale thereof. A large sum was also paid for maintenance of the animals and other expenses until they were sold. The insured then assigned all right in the live stock to the plaintiffs, and were paid as for a constructive total loss. The plaintiffs alleged that all the expenditure for salvage, transportation, and maintenance of the animals, constituted "*special charges*," within the meaning of the re-insurance policy, and sued the defendants for their proportion of the amount:—*Held*, that the term "*special charges*" is equivalent to "*particular charges*," and includes expenses for salvage, preservation, and sale of the object insured. The word "*special*" merely distinguishes an expense incurred in a particular interest from an expense incurred in the general interest, which latter gives rise to general average contribution. *Special charges* cover all expenses occasioned by a peril insured against, when they have been necessarily incurred in consequence of such peril.—2. The fact that the plaintiffs had paid the principal insured as for a total loss, and the circumstance that the defendants may not have been interested in incurring all or any of the charges, did not relieve the defendants from liability for contribution to such charges. *Western Assurance Co. v. Baden Marine Assurance Co.*, Q. R. 22 S. C. 374.

### INTERDICT.

**Curator—Removal — Pension—Family council.**—The curator of a person interdicted for habitual drunkenness has power to sue for an alimentary pension due to the interdict, and his refusal to do so when the interdict is in absolute need of the pension, is a ground for removing him from the curatorship.—2. The advice of a family council as to the expediency of removing the curator is useless where the council was not represented when evidence was given upon the demand for removal, or where such

evidence was not communicated to the council. *Gagnon v. Gauthier*, Q. R. 22 S. C. 310.

See LUNATIC.

### INTEREST.

**1. Contract — Chattel mortgage — Statement of rate—Interest Act, 1897—Statutes—Waiver.**—A chattel mortgage provided for the payment of \$125, the principal money, in consecutive monthly instalments of \$5 each, and for payment of \$5 more with each instalment, for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897:—*Held*, that this being an Act passed on grounds of public policy for the benefit of borrowers, its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate. *Dunn v. Malone*, 23 Occ. N. 328, 6 O. L. R. 484.

**2. Disputed accounts—Federal and Provincial Governments—Award—Agreement as to date from which interest to be computed.**—In certain arbitration proceedings between the Dominion of Canada and the Provinces of Ontario and Quebec, the first mentioned Province was found to be indebted to the Dominion in the sum of \$1,815,848.59 on the 31st December, 1892.—Upon a case stated to determine whether interest was payable by the Province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only:—*Held*, that the correspondence shewed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned. *Dominion of Canada v. Province of Ontario*, 23 Occ. N. 100, 8 Ex. C. R. 174.

**3. Hypothec—Several properties — Sale—Distribution of proceeds—Collocation.**—When two or more immovables hypothecated by the same instrument are sold at different dates, and the amount of the obligation is not entirely paid by the proceeds of the first sale, the interest upon the obligation continues to run, and the creditor has a right to be collocated by virtue of his hypothec upon the proceeds of the second sale. *Garand v. Charlebois*, Q. R. 21 S. C. 488.

**4. Moneys of company—President and manager—Extra salary—Trustee—**

*Statute of Limitations—Reference—Powers of Master.*]—The appellant, who was for many years the president and general manager as well as the principal shareholder of an incorporated company, withdrew from the funds of the company, between the 1st August, 1889, and December, 1900, at the rate of \$5,025 per annum, as salary in addition to his regular salary. He assumed to do this under a resolution authorizing the payment of extra remuneration to the "staff," but it was held by the Court of Appeal (27 A. R. 540) and by the Judicial Committee ([1902] A. C. 83), that the resolution did not apply to him, and he was ordered to account for the moneys received during the whole period, notwithstanding a plea of the Statute of Limitations:—*Held*, that his position was that of a trustee for the company, and that he was chargeable with interest on the moneys received.—*In re Exchange Banking Co., Flitcroft's Case*, 21 Ch. D. 519, followed.—*Held*, also, that the Master upon a reference had power under Con. Rules 666 and 667 to charge the appellant with interest, although the judgment directing the reference was silent on the subject. *Earle v. Burland*, 23 Occ. N. 276, 6 O. L. R. 327.

See ASSESSMENT AND TAXES, II. 2—BANKRUPTCY AND INSOLVENCY, I. 16—BANKS AND BANKING, 2—CONSTITUTIONAL LAW, 8—CONTRACT, VI. 1—CROWN, III. 2, IV. 3—LANDLORD AND TENANT, III. 6, 19—LIMITATION OF ACTIONS, II. 3—REVENUE, 2—SALE OF GOODS, IV. 4—SOLICITOR, 3—WILL, I. 3.

### INTERIM ALIMONY.

See HUSBAND AND WIFE, I. 3.

### INTER-PROVINCIAL ARBITRATION.

See ARBITRATION AND AWARD, 1.

### INTERVENTION.

See BANKS AND BANKING, 4—CONSTITUTIONAL LAW, 11—TRESPASS TO LAND, 4.

### INTESTATES' ESTATES ACT (IMP.)

See DISTRIBUTION OF ESTATES, 3.

### INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT—INDIAN—LIQUOR ACT OF ONTARIO—LIQUOR LICENSE ACT—SALE OF GOODS, VI. 1.

### INVENTORY.

See DISTRIBUTION OF ESTATES, 1.

### JOINDER OF PARTIES.

See PARTIES.

### JUDGMENT.

- I. FOREIGN JUDGMENT.
- II. RE-OPENING, VARYING, OR SETTING ASIDE.
- III. SUMMARY JUDGMENT.
- IV. OTHER CASES.

See APPEAL, II. 7, X. 12—ASSESSMENT AND TAXES, II. 2—BANKRUPTCY AND INSOLVENCY, I. 8, 9—CONTEMPT OF COURT, 2—COURTS, I. 2, 3, III.—DAMAGES, 6—DESISTMENT, 1—DISCOVERY, I. 2—DISTRIBUTION OF ESTATES, 4, 6—EXECUTION—FRAUDULENT CONVEYANCE, 1—FRAUDULENT PREFERENCE, 1—GIFT, 7—HUSBAND AND WIFE, VI. 2, VII. 3, VIII. 2, 3—OPPOSITION, 3—PLANS AND SURVEYS—PLEADING, VIII. 6, IX. 1—PRINCIPAL AND SURETY, 2—PROHIBITION—RAILWAY, I. 1, 2—SALE OF GOODS, II. 2—SOLICITOR, 8—SPECIFIC PERFORMANCE, 3—WILL, I. 3.

#### I. FOREIGN JUDGMENT.

1. *Action on—Equitable relief—Declaratory judgment—Simple contract creditor—Statute of Limitations.*]—A creditor under a Quebec judgment asked a declaration that the judgment debtor was beneficial owner of a certain claim against the Dominion government:—*Held*, that being in this Province in the position of a simple contract creditor he was not entitled to such relief, for the same reasons which debar a simple contract creditor from taking garnishee proceedings or proceedings for equitable execution; and also because, the claim being one against the Crown, no consequential relief was or could be asked.—*Held*, also, that the judgment, being more than six years old, would under ordinary

circumstances have become barred; but since the judgment debtor was not at the time of the recovery, nor had been since, in this Province, the plaintiff's remedy was saved by R. S. O. 1897 (vol. 3) c. 324, s. 40. *Stewart v. Guibord*, 23 Occ. N. 242, 6 O. L. R. 262.

**2. *Lis pendens*—Declaratory judgment—Action pending in another Province.**—A judgment rendered in a Province of the Dominion other than the Province of Quebec is not considered in Quebec to be a judgment rendered in a foreign country, and the Quebec Courts will recognize it if it is in accordance with the provisions of Art. 211, C. P.—2. A defendant may, by a plea of *lis pendens*, answer a suit begun in the Province of Quebec, alleging that a suit of the same nature between the same parties and for the same causes of action is pending in another Province of the Dominion.—3. But if the Quebec action has for its object only to have a judgment rendered in another Province declared binding, the fact that the plaintiff has made a like demand in another Province, and that it is actually pending, does not justify a plea of *lis pendens*, so long as the Court is not asked to pronounce upon the cause of action, but to adjudge merely that the judgment has been regularly rendered. *Blackwood v. Percival*, Q. R. 23 S. C. 5.

## II. RE-OPENING, VARYING, OR SETTING ASIDE.

**1. Application to vary—Costs.**—The defendant K., an auctioneer, advertised at the instance of the defendant M. certain land for sale at public auction claimed by the plaintiff and M. This suit was brought for an injunction restraining the sale and for a declaration of title. An interim injunction was granted. An ejectment action was also brought by the plaintiff against M. in respect of the same land, and judgment therein was given for the plaintiff. The defendants appeared by the same solicitor and joined in their answer in this suit. At the hearing a decree was made against the defendants with costs. K. now applied to vary the decree so far as it ordered him to pay costs, alleging that since putting in his answer he had had nothing to do with the conduct of the suit, believing himself to be but a nominal defendant, and his co-defendant to be responsible for the defence.—*Held*, that the application should be refused, but without costs. *Robertson v. Kerr*, 23 Occ. N. 266.

**2. Default judgment—Statement of defence—County Court.**—An order made in an action in a County Court for service of notice of a writ out of the jurisdiction provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only \$103 but otherwise disputes plaintiffs' claim in this action:—"*Held*, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void. *Voight Brewery Co. v. Orth*, 23 Occ. N. 168, 5 O. L. R. 448.

**3. Default judgment—Petition for review—Declinatory exception.**—A defendant who does not reside in Canada and has been summoned by way of publication, may, with his petition for review of a judgment rendered against him by default, file preliminary exceptions, and notably a declinatory exception, if the contract set up by the plaintiff has not been made in the Province of Quebec and the cause of action has not arisen there. *Levy v. Arkbulatoff*, 5 Q. P. R. 204.

**4. Opposition—Defendant not served—Petition in review—Exception to form.**—An opposition to a judgment, based upon the fact that the defendant has not been served with process in the action, must shew the grounds of defence of the defendant in the action, and, if it is begun after the time fixed, it cannot be regarded as a petition in review if it does not contain such grounds.—2. *Semble*, that an exception to the form must reserve the recourse of the plaintiff. *Hénault v. Fulton*, 5 Q. P. R. 213.

**5. Opposition—Petition for review—Nullity of service—*Saisie-gagerie*—Irregular sale—Damages—*Res judicata*.**—The defendant may proceed by way of opposition to a judgment or of petition for review of a judgment rendered without the defendant having been heard or called upon, and in such a case it is sufficient to allege the nullity of the service without any other ground of defence.—2. A party whose effects have been sold upon a writ of *saisie-gagerie en capulsion*, which has not been served upon him, may claim damages for the irregular sale of his effects, and the order dismissing his opposition to a judgment based upon the defective service, does not constitute *res judicata* against him in his suit for damages. *Fulton v. Hénault*, 5 Q. P. R. 268.

**6. Petition to reopen — Discovery of fresh evidence.]**—A party cannot by petition demand the setting aside of a judgment upon the allegation that he has since found letters of such a nature that they would have the effect of changing the judgment, if such letters were in his possession at the time of trial. *Warin v. Werthermer*, 5 Q. P. R. 462.

**7. Petition to vary — Final judgment—Contestation of dividend sheet—Curators—Inscription—Notice.]**—A judgment maintaining the contestation of a dividend sheet is a final judgment, subject to review or appeal, and can only be modified by the Court which pronounced it in accordance with one or other of the modes provided by Arts. 1163 *et seq.*, C. P.—2. There is ground for a petition against such a judgment when it alleges that the curators affected by the judgment had no notice of the last inscription of the contestation. *Bayeur v. Seath*, 5 Q. P. R. 241.

**8. Reference by consent to experts—Misunderstanding of counsel as to purpose of reference — Opening up judgment.]**—In a proceeding before a Master in a mechanic's lien matter, an understanding was arrived at between the counsel for the plaintiff and defendant, and orally communicated to the Master. When the time arrived to act on the understanding, the counsel disagreed in their recollection of what the understanding was. The Master entered judgment for the amount found due by certain experts, in accordance with his understanding of the agreement:—*Held*, that the judgment given by the Master, whose recollection of the understanding was the same as that of the plaintiff's counsel, in favour of the plaintiff, must be reopened and the matter referred back, as the parties were not *ad idem*. *Wilding v. Sanderson*, [1897] 2 Ch. 534, referred to. *Beaudry v. Gallien*, 23 Occ. N. 46, 5 O. L. R. 73.

### III. SUMMARY JUDGMENT.

**Rule 603—"Debt or liquidated demand"—Contract—Ascertainment.]**—The defendant, having entered into an agreement to manufacture for and deliver timber to the plaintiff, received from him certain advances in money, exceeding the value of the timber actually delivered, and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained.—In an action to recover the balance of the advances overpaid:—*Held*, that the claim was not

a debt or liquidated demand within the meaning of Con. Rule 138, and an order of a local Judge giving leave to sign judgment under Con. Rule 603 was set aside. *McIntyre v. Munn*, 23 Occ. N. 297, 6 O. L. R. 290.

### IV. OTHER CASES.

**1. Confession of defence arising after action — Judgment for costs — Waiver of other defences.]**—Action for damages for trespass to land and for an injunction. An interlocutory injunction was granted, but afterwards discharged by consent, the right to acquire the land having been obtained after action. The defendants then obtained leave to plead, and pleaded that since the commencement of the action, the town of B. had expropriated the plaintiff's land, etc., and had paid him the damages awarded, and that said award included all damages done to the plaintiff's land by the defendants, as well as all the trespasses, acts, and grievances complained of in the statement of claim. The plaintiff confessed this defence, and entered judgment for his costs to be taxed:—*Held*, that this defence operated as a waiver of other defences: and a motion to set aside the judgment was refused. *Calder v. Middleton and Victoria Beach R. W. Co.*, 23 Occ. N. 22.

**2. Defence arising after action brought — Confession — Judgment for costs without Judge's order—Other defences—Discretion.]**—The decision of *TOWNSHEND, J.*, 22 Occ. N. 432, affirmed on appeal by the Supreme Court of Nova Scotia. *Ruggles v. Middleton and Victoria Beach R. W. Co.*, 35 N. S. Reps. 553.

**3. Desistment — Appeal pending — Jurisdiction of Court below—Costs.]**—Where the action has been dismissed, and the plaintiff appeals from the judgment dismissing it, and the parties in whose favour the dismissal has been granted desist from the judgment in their favour, the Superior Court is, in spite of such desistment, *functus officio* in the cause, and cannot take cognizance of subsequent proceedings as long as the appeal is pending.—2. A motion dismissed upon a ground not set up by the parties will be dismissed without costs. *Lamothe v. Piche*, 5 Q. P. R. 172.

**4. Interpretation — Reasons for judgment.]**—If the reasons for a judgment shew that there is a mistake, ambiguity, or obscurity in the adjudication, they may be taken into consideration

in order to shew the meaning. *Adam v. Gagné*, Q. R. 22 S. C. 367.

**5. Life of judgment — Statute of Limitations—Payment — Sale under execution—Purchase by execution creditor—(crediting price—Ex parte order for execution—New right.)**—At a sale of lands under execution, the lands sold were bid in by the judgment creditor, and the amount of the bid credited on the execution by the sheriff on account of the judgment debt:—*Held*, that this was not a payment by or on behalf of the debtor to take the case out of the Statute of Limitations:—*Held*, further, that an order for the issue of a writ of execution, made by a Judge *ex parte*, during the currency of the period of twenty years from the recovery of the judgment, the judgment debtor having died out of the Province intestate, and no administrators having been appointed, conferred no new right upon the defendant sufficient to keep the judgment alive, and unbarred by the statute:—*Held*, that to obtain a new right against anyone, by reason of such an order the defendant must have given notice, which he could have done, either by applying as a creditor to have administrators appointed, or by notifying the heirs. *Lefurgey v. Harrington*, 36 N. S. Reps. 88.

## JUDGMENT DEBTOR.

**1. Committal — Conditional order — Service—Arrest — Terms of discharge—County Court practice — Registrar's minute.]**—An order to commit a judgment debtor under s. 193 of the County Courts Act must be absolute, not conditional.—Where an order to commit a party is made in his absence, he must be served with a copy of the order before arrest. — Orders to commit should be drawn up and should contain the terms on which discharge out of custody may be obtained, as required by Order XIX., r. 13.—Where a Registrar is present and takes a minute of an order, the minute so taken is conclusive, even though the Judge's recollection of the order is different. *Wallace v. Ward*, 9 Brit. Col. L. R. 450.

**2. Examination—Default — Motion to set aside summons.]**—The examination of a debtor, after judgment, can only take place in the cases mentioned in Art. 590, C. P.—2. A debtor who has made default to appear upon a summons wrongly issued, may nevertheless demand, by motion, the setting aside of the summons. *Alden Knitting Mills v. Hershfield*, 5 Q. P. R. 390.

**3. Order for committal — Appeal from—Questions of fact—Affidavit—Oral evidence.]**—The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the Judge making the order has taken some manifestly mistaken view of the law or the facts. As such Judge has had the opportunity of hearing the witnesses give their testimony *viva voce*, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury.—On an application for a rule *nisi* to rescind a Judge's order imprisoning a judgment debtor, the applicant cannot shew by affidavit what took place before the Judge to whom the application was made; the stenographer's return of the evidence must be produced. *Es p. Despres, In re O'Leary v. Despres*, 36 N. B. Reps. 13.

See ATTACHMENT OF DEBTS, II. 8, 10 —COURTS, II.

## JUDICIAL SALE.

See COMPANY, III. 11 — EXECUTION — SHIP, III.

## JUNCTION.

See RAILWAY, VIII. 3.

## JURA REGALIA.

See CONSTITUTIONAL LAW, 2.

## JURISDICTION.

See APPEAL — CONTRACT — COURTS — CRIMINAL LAW, II. 11 — EXTRADITION—PROHIBITION—WRIT OF SUMMONS.

## JURY.

See LIQUOR ACT OF ONTARIO, 3—NEW TRIAL—TRIAL II.

## JURY NOTICE.

See TRIAL, III.



## JUSTICE OF THE PEACE.

**1. Ministerial duties—One justice sufficient.]**—In cases tried under the Summary Act, purely ministerial duties, such as receiving complaint, issuing warrant, etc., may be done by one justice of the peace, even where the statute under which the proceedings are had, says that the case can only be tried by two justices of the peace. *Bousquet v. Gagnon*, Q. R. 23 S. C. 35.

**2. Offence committed in a harbour—Jurisdiction—Adjacent county.]**—Upon the shores of the high sea it is only land not covered by the sea which forms part of the adjacent counties, and, therefore, the jurisdiction of the Courts of these counties does not extend beyond the line of low tide.—2. Bays, gulfs, mouths of rivers, harbours, ports, roadsteads, or waters situated between the necks of land, where one can see from one bank to the other, form part of neighbouring or adjacent counties, and consequently an offence committed upon such waters is within the territorial jurisdiction, and not the Admiralty.—3. The port of Percé, in which an offence was committed, is part of the adjacent county of Gaspé, having regard to the facts (a) that it is an inland water almost entirely surrounded by land, and lying between necks of land, and (b) that the statute, in making the river the border of this county and including in it the nearest islands, includes also the waters of the ports and the roadsteads which lie between these islands and the mainland because they are between necks of land.—4. Consequently, a magistrate of the district of the county of Gaspé has jurisdiction over an offence or a tort or a quasi-tort committed at this place: and a writ of prohibition against the enforcement of a decision of such a magistrate will not be maintained. *Duguay v. North American Transportation Co.*, Q. R. 22 S. C. 517.

**3. Penalty—Excessive fee—Information for indictable offence—Pleading—Amendment.]**—An information having been laid by the plaintiffs before the defendant, a justice of the peace, for an indictable offence under ss. 210 (2) and 215 of the Criminal Code, over which the defendant had no summary jurisdiction as a justice:—*Held*, that he was not entitled to any fee whatever, and that the plaintiffs, while they were entitled to recover by action the amount of the fee which they paid, could not maintain an action under s. 3 of R. S. O. 1897 c. 95, or under s. 902, s.s. 6, of the Criminal Code, to recover a penalty from the defendant for receiving a larger amount of fees as a justice of the peace

than he was entitled to.—*Bowman v. Blyth*, 7 E. & B. 26, applied and followed.—It was alleged by the statement of claim that the defendant wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiffs the sum of, etc., contrary to the Ontario Act. At the trial the plaintiffs were allowed to amend by substituting "wilfully" for "maliciously and without reasonable or probable cause," and by making an alternative claim under s. 902, s.s. 6, of the Criminal Code:—*Held*, that the amendments were properly made. *McGillivray v. Muir*, 23 Occ. N. 282, 6 O. L. R. 154.

**4. Void conviction—Action en nullité.]**—A conviction made by a person illegally exercising the functions of a justice of the peace is void, and may be attacked by way of a direct action to declare it void. *Corporation of Ham Nord v. Juneau*, Q. R. 21 S. C. 530.

See CERTIORARI, 2—CRIMINAL LAW, II. 11, III. 17, IV. 3—LIQUOR ACT OF ONTARIO, 1—LIQUOR LICENSE ACT, III.—MALICIOUS PROSECUTION, 2, 4—MUNICIPAL CORPORATIONS, VI. 2—REVENUE, 3.

## JUVENILE OFFENDERS.

See CRIMINAL LAW, II. 15, 16.

## KEEPING COMMON GAMING HOUSE.

See CRIMINAL LAW, II. 6.

## LACHES.

See CERTIORARI 4, 5—VENDOR AND PURCHASER, 3.

## LAND.

See CROWN, II.—RAILWAY, VII.

## LAND SUBSIDY.

See RAILWAY, VII. 5.

## LAND TITLES ACT.

Claim on assurance fund—Transfer—Fraud—Forgery—Bond fide pur-

*chaser for value without notice.*—The plaintiff, being the owner of land registered under the Land Titles Act, R. S. O. 1897 c. 138, was, by the fraud of two persons, G. and H., induced to transfer her land to one D. Subsequently a transfer to McD., purporting to be signed by D., was registered, but D.'s signature was forged. McD. then transferred to O'M., and O'M. to B., both being parties to the fraud with G. and H.—B. transferred to C., an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible, an action was brought for compensation for the loss of the land out of the assurance fund, under ss. 130 and 132 of the Act:—*Held*, that the plaintiff was not "wrongfully deprived" under s. 132, and that she could not recover. *Fawkes v. Attorney-General for Ontario*, 23 Occ. N. 328, 6 O. L. R. 490.

See DISTRIBUTION OF ESTATES, 3.

## LANDLORD AND TENANT.

- I. DISTRESS.
- II. INJURY TO TENANT.
- III. LEASE.
- IV. NOTICE TO QUIT.
- V. OVERHOLDING TENANTS.
- VI. RENT.
- VII. OTHER CASES.

See APPEAL, X. 9—BANKRUPTCY AND INSOLVENCY, I. 16—COURTS, IX. 4—CROWN, II. 2—EXECUTION, II. 5—INJUNCTION, 9—LIS PENDENS, 1—PARTITION, 2—PRINCIPAL AND SURETY, 4—RAILWAY, VII. 1—WATER AND WATERCOURSES, 3.

### I. DISTRESS.

**Lodger's goods**—*Action for damages—Pleading—Cause of action.*—In an action for damages for the alleged wrongful distress of a piano, the property of the plaintiff, the statement of claim set out that the plaintiff was a lodger; that her property was seized and illegally removed, for which she claimed compensation under the provisions of R. S. N. S. c. 172, s. 15; that the property seized and removed was only returned under order of the Judge of a County Court:—*Held per TOWNSHEND J.*, that, as the whole of s. 15 was necessarily made a part of the statement of claim, its provisions, read in connection with the other facts alleged, disclosed a good cause

of action. — *Per MEAGHER, J.*, that, as the cause had been fully tried out, and no hardship could result, the cause should be treated as if the pleadings were correct, although there were defects on both sides.—*Per RITCHIE, J.*, that the statement of claim disclosed no cause of action, and that the appeal should therefore be allowed and the action dismissed, although it appeared that the defendant had no defence to the cause of action proved at the trial, but not disclosed by the statement of claim. *Gray v. Harris*, 35 N. S. Repts. 519.

## II. INJURY TO TENANT.

**1. Defects in premises**—*Apparent defects.*—A landlord is not responsible to his tenant for damages for injuries sustained on account of defects in the demised premises which were apparent and existed at the time of the execution of the lease. *Cartier v. Durocher*, Q. R. 22 S. C. 255.

**2. Demise of part of building**—*Defective condition of other part.*—The plaintiff was tenant of a store on the ground floor of a building owned by the defendant, and sued for damages to her goods caused by rain water entering by an unglazed fanlight over a door at the end of a hall extending from the head of a stairway leading to the second floor of the building. The water, flowing over the floor above the plaintiff's store, came through the ceiling, and caused plaster to fall which damaged the plaintiff's goods.—The defect complained of existed at the time of the demise to the plaintiff:—*Held*, following *Humphrey v. Wait*, 22 C. P. 580, *Colebeck v. Girdlers' Co.*, 1 Q. B. D. 234, and *Carstairs v. Taylor*, L. R. 6 Ex. 217, that the defendant was not liable. *Muller v. Hancock*, [1893] 2 Q. B. 177, distinguished.—A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects. *Rogers v. Sorrell*, 23 Occ. N. 247, 14 Man. L. L. 450.

**3. Disturbance of enjoyment**—*Escape of water from adjoining premises.*—A landlord is liable to his tenant for injuries done to the tenant's goods arising from the fact of thieves having entered an adjoining dwelling-house belonging to the landlord and there upset a cistern, which caused water to escape into the house leased to the tenant, such act not being a simple tres-

pass committed by a third person, within the meaning of Art. 1616, C. C., but a substantive act which modified the enjoyment in a manner prejudicial to the tenant. *Brisker v. Larue*, Q. R. 23 S. C. 447.

### III. LEASE.

**1. Charge on land—Opposition to sale by sheriff.]**—A lease for one year, whether registered or not, does not constitute a charge upon the immovable leased, and gives no right to the tenant to make an opposition *à fin de charge*, when the immovable is to be sold by the sheriff. *Lantaigue v. Skelling*, Q. R. 22 S. C. 304.

**2. Covenant — Breach of — Assignment without leave — Re-entry—Formal execution of assignment after action.]**—The right of re-entry under the short form of lease applies to the breach of a negative as well as an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave.—*Toronto General Hospital Trustees v. Denham*, 31 C. P. 203, followed.—The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant, so that the fact of the document shewing the transfer not having been executed until after action brought, is immaterial. *McMahon v. Coyle*, 23 Occ. N. 225, 5 O. L. R. 618.

**3. Covenant—Goods on premises to secure rent — Valuation.]**—Where, by a lease, the lessee undertook to furnish the leased premises with "a sufficient quantity of household furniture or goods to secure the payment of one year's rent," the effects upon the leased premises should be valued in accordance with their ordinary merchantable value, and not in accordance with what they might bring at a forced sale. *Rousseau v. Archibald*, Q. R. 12 K. B. 14.

**4. Covenant—Implied covenant to crop and cultivate—Damages for deterioration.]**—The plaintiff leased to the defendant's husband land for five years, yielding and paying therefor the clear yearly rent or sum of one-third of the crop. The lease contained covenants by the lessee that he would cultivate in a good husbandlike and proper manner so as not to impoverish or injure the soil, and plough and crop the same in a proper farmerlike manner.—Afterwards a new lease was made substituting the defendant as lessee, instead of her husband.

This did not contain any of the above-mentioned covenants, or anything specially applicable to leases of farms, but contained the following: "Yielding and paying therefor yearly and every year during the said term . . . the sum of one-third of the crop grown, to be payable, . . . the first of such payments to become due and to be made when threshed in the fall of each year," and a covenant to plough in each year of the term four inches deep, which was written into it. It did not contain express covenants to cultivate or crop:—*Held*, that there should be judgment for the plaintiff for deterioration in value of land from defendant's omitting to plough, cultivate, and crop in 1902, \$300, and for loss of wheat, barley, and oats, \$291.76, in all \$591.76. — Implied covenants to cultivate and crop in each year should be read into the second lease: *McIntyre v. Belcher*, 14 C. B. N. S. 654; *Hamlyn v. Wood*, [1891] 2 Q. B. 491.—The defendant bound herself to plough four inches deep in each year. That must mean that she would plough for the purpose of cultivating and cropping. The wording of the provision as to the payment to the lessor of a third of the crop in each year, would imply that a crop was to be grown in each year of the term. *Dunsford v. Webster*, 23 Occ. N. 290.

**5. Covenant—Lease by tenant for life —Straw and manure — Property in — Emblements.]**—During the lifetime of the widow and tenant for life, two of the farms belonging to the estate were leased for five years, dependent on her living so long, and the lessees covenanted to cultivate, till, manure . . . and to spend, use, and employ in a proper husbandlike manner all the straw and manure . . . and not to remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, and to carefully stack the straw . . . and turn all the manure thereon into a pile (so it may heat and rot so as to kill and destroy foul seeds), and thereafter and not before to spread the same on the land:—*Held*, that the defendants were not entitled to the straw and manure as emblements, as the widow was not in actual occupation or cultivation of the lands on which it was produced:—*Held*, also, that the lessees would have been entitled to the straw and the manure, which had been piled into heaps, but for their covenants, which precluded them from making any claim; and that the covenants might be construed or held to operate as a reservation of the straw and manure to the lessor to be dealt with in the stipulated manner, and, as the lessees' right or power and obligation so to deal with it came

to an end with the death of the lessor, it passed to her representatives unrestricted thereby.—*Sneltinger v. Leitch*, 32 O. R. 440, referred to. *Gardner v. Perry*, 23 Occ. N. 295.

**6. Covenant — Railway company — City lease — Usual covenants — Covenants to pay taxes and repair — Right of re-entry — Rent in arrear — Interest on.**]

—An agreement made between the Corporation of the city of Toronto and the Canadian Pacific Railway Company, provided, amongst other things, for a lease renewable in perpetuity, in successive terms of fifty years, at an agreed rent, payable on named days, nothing being said about covenants:—*Held*, that the agreement was not self-contained, but that the execution of a formal lease was contemplated, which should contain the usual covenants, and that covenants to pay taxes, and for the right of re-entry for non-payment of rent or taxes, were, under the circumstances here, usual covenants.—Where, by the agreement, a time was fixed for the commencement of the lease, and the railway company entered into possession, and had the enjoyment of the demised premises, but the title was not settled until some time afterwards, interest on arrears of rent, which accrued due in the meantime, was allowed.—Decision of *BOYD, C.*, 4 O. L. R. 134, 22 Occ. N. 235, reversed in part. *In re Canadian Pacific R. W. Co. and City of Toronto*, 23 Occ. N. 218, 5 O. L. R. 717.

**7. Crops — Provision as to — Execution against tenant — Rights of landlord — Bills of Sale Act — Seizure of equitable interest.**]

—The claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes, and to repay advances and other indebtedness; that the lessee, immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned.—The grain in question had, un-

til its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease and not for rent:—*Held*, that the lease did not operate to prevent the lessee from ever having any property in the grain to be grown.—2. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charge for taxes and advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902 c. 11, s. 39, as being a charge upon crops to be grown in the future.—3. That the interest of the lessee in the grain whether legal or only equitable, was subject, under s. 182 of the County Courts Act, R. S. M. 1902 c. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff. *Campbell v. McKinnon*, 23 Occ. N. 234, 14 Man. L. R. 421.

**8. Expiry — Continuance of possession by tenant — Special agreement — Tenancy at will.**]

—The reservation or payment of rent in aliquot proportions of a year, is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shown to repel the implication:—*Held*, therefore, in this case, where the landlord, before he accepted any rent after expiry of the lease, expressly told the tenant that he would not consent to any tenancy from year to year, so as to require any notice of termination to be given, but that they should remain in the same position as they were on the expiry of the lease, to which the tenant assented—the rent, however, to be the same as that reserved in the lease, and to be paid in like manner—the tenant was not a tenant from year to year, but a tenant at will. *Idington v. Douglas*, 23 Occ. N. 286, 6 O. L. R. 266.

**9. Forfeiture — Non-payment of rent — Damages — Declinatory exception.**]

—A declinatory exception, which concludes simply for the dismissal of the action, where it is shown that the Court is competent, must be dismissed.—2. A landlord who demands the cancellation of the lease for non-payment of rent, may allege, besides, that he incurred, on account of the loss of future rents, damages to a certain amount, and is not obliged to limit his demand to three months' rent to fall due. *Belanger v. Dubois*, 5 Q. P. R. 342.

**10. House not completed — Requirements as to heating.]**—Where in a lease of a house in the course of construction, it is provided that the lessee shall take the house in the condition in which it shall be at the time of delivery over, provided that the work is finished, and the arrangement of the house shews (the owner having placed in it pipes for a system of hot water heating) that the house is to be heated by hot water, the tenant, especially if the house, by reason of its construction, cannot easily be heated with stoves, may require that the owner shall place radiators in every room where the visible indications make it apparent that the intention was to so place them, and a furnace of a capacity sufficient to heat the water for such system. *Bazinet v. Colletterie*, Q. R. 21 S. C. 508.

**11. Proviso for subletting—Right of landlord to refuse consent.]**—Action for cancellation of a lease on the ground that the defendant, in violation of one of its terms, sublet the premises without having obtained the plaintiffs' written consent. The defendant pleaded that the plaintiffs refused their consent without cause, being only ready to grant the same upon the condition that the rent should be increased; that the subtenant was solvent and was willing to pay the rent yearly in advance, or to furnish security. Against these allegations the plaintiffs inscribed in law, claiming that they were irrelevant, and that the plaintiffs had an absolute right to refuse consent:—*Held*, following *MacKenzie v. Wilson*, 10 L. N. 113, that the clause in the lease being absolute, the plaintiffs had the right to refuse consent, and that, therefore, the grounds urged by the defendant did not constitute any legal justification for his conduct in subletting.—Inscription-in-law maintained and paragraphs of plea complained of struck out with costs. *Racette v. Carriere*, 23 Occ. N. 117.

**12. Registered lease—Sale of property by sheriff under hypothec—Opposition by tenant—Security.]**—An hypothecary creditor has a right to demand that a tenant who makes an opposition *à fin de charge*, based upon a registered lease, shall furnish good and sufficient security that the property will be sold at a price sufficient to assure the amount of his claim, and this before the property has been advertised subject to the charge.—*Semble*, that a tenant, whose lease has been registered, has a right to proceed by way of opposition *à fin de charge*. *Desaulniers v. Papette*, 5 Q. P. R. 344.

**13. Renewal — Arbitration—Lessee naming arbitrator under protest—Land-**

**lord appointing sole arbitrator.]**—The lessee under a renewal lease contended that he was not obliged to take a renewal, and wished to have this point settled before arbitrating to fix a renewal rent. The lessors, however, urged on the preliminaries for having arbitrators appointed, and to this the lessee responded by naming an arbitrator under protest so as to save his rights in regard to his contention. The lessors refused to accept this nomination, and proceeded to appoint a sole arbitrator, as though the lessee had made no appointment:—*Held*, that the lessors had no power thus to appoint a sole arbitrator; and an injunction was granted restraining them from proceeding before such sole arbitrator.—The arbitration might have proceeded in the ordinary form of three arbitrators notwithstanding the protest of the plaintiff, who might in the end have had the benefit of his legal objection. *Farley v. Sanson*, 23 Occ. N. 13, 5 O. L. R. 105.

**14. Rescission — Immoral use of premises — Knowledge — Costs.]**—The fact that the lessor's *auteur*, who was also the manager of the company appellant, was aware, during several years, that a portion of the leased premises was being used for immoral purposes, and that he acquiesced therein, does not deprive the purchaser and transferee of such premises of the right to demand the rescission of the lease on the ground of such immoral use of premises. Such knowledge can only affect the question of costs. *Provident Trust and Investment Co. v. Chapleau*, Q. R. 12 K. B. 451.

**15. Rescission — Tenant quitting possession — Rent to fall due—Damages—Injury to premises.]**—Where the tenant leaves the demised premises before the expiry of the lease, the landlord cannot claim as damages a sum equal to the rents which would fall due under the lease, unless he also claims cancellation of the lease.—2. The landlord, in these circumstances, cannot, before the expiration of the lease, claim damages for injury done by the tenant to the demised premises. *Amiot v. Bonin*, Q. R. 23 S. C. 42.

**16. Surrender — Eviction — Surrender by operation of law.]**—The plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to the defendant, who did not take possession of the premises. The plaintiff, on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises, which she proceeded to clean up and repair, and she took down a sign board having on it the firm name of H. A. & Co., and painted the name out. The

plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:—*Held*, that there had been a surrender of the premises to the landlord by act and operation of law. *Phené v. Popplewell*, 12 C. B. N. S. 334, applied. *Gold v. Ross*, 23 Occ. N. 253, 10 Brit. Col. L. R. 80.

**17. Surrender—Substitution of tenant — Liability for rent — Distress — Amendment — Rent accruing after action.]**—Where a tenant by arrangement with his landlord secured another occupant for the premises, but was given to understand at the time that he would still be liable for the rent:—*Held*, that this did not amount to a surrender of the lease.—In order to constitute a surrender it must be shewn that the incoming tenant has been expressly received and accepted by the landlord as his lessee in the place and stead of the original lessee by the mutual agreement of the parties:—*Held*, also, that the fact that the landlord at the request of the tenant has issued a distress warrant against the subtenant is not sufficient to constitute a surrender by operation of law.—Amendment allowed so as to include a claim for additional rent which fell due after the commencement of the action. *Lougheed v. Tarrant*, 2 Terr. L. R. 1, 13 Occ. N. 473.

**18. Tacit reconduction—Oral lease — Mise en demeure—Damages — Non-repair.]**—Lease by tacit reconduction is not a verbal lease.—2. Under such a lease, a verbal *mise en demeure* to make repairs is insufficient.—3. A *mise en demeure* is necessary in order to claim from the landlord damages resulting to the tenant from non-repair of the premises. *Pelletier v. Boyce*, Q. R. 21 S. C. 513.

**19. Valuation of buildings — Extension of time for making award—Interest.]**—By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuers or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the

valuators or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the land and buildings was given up by the lessees to the lessors on the 31st October, 1900:—*Held*, *OSLER, J.A., dubitante*, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent. and for the remainder of the time at the legal rate of five per cent.—Judgment of a Divisional Court, 3 O. L. R. 519, 22 Occ. N. 178, varied. *Toronto General Trusts Corporation v. White*, 23 Occ. N. 10, 5 O. L. R. 21.

#### IV. NOTICE TO QUIT.

**Time — Computation—Non-juridical day.]**—Article 8, C. P., which says that the day upon which a thing ought to be done being a non-juridical day, the thing may be done with the same effect on the next following juridical day, does not apply to the three days which the landlord may give to the tenant, by virtue of Art. 1089, C. P. C., to leave the demised premises; therefore, when the last day is non-juridical, the tenant cannot delay his removal to the next day. *Beaudry v. Hannigan*, Q. R. 23 S. C. 232, 5 Q. P. R. 366.

#### V. OVERHOLDING TENANTS.

**1. "Colour of right."]**—An agreement dated the 4th May, 1900, was entered into whereby L. acknowledged that he was a weekly tenant of the premises in question to H., and agreed that his lease might be terminated at any time by "the party of the first part" (evidently an error for "the party of the second part") or by J. O. or J. A. M. A., whom L. acknowledged to be the agents for that purpose of the party "of the first part," meaning H. At that time the property was vested in H., but he was merely a trustee for the railway company. Afterwards the property was conveyed to the company. At the time the notice to quit was served L. was tenant of the premises to the company as landlords under the terms of the agreement of the 4th May, 1900. Notice to quit was served on L. on the 29th June, 1903, and demand of possession was served upon him on the 15th July following. — The tenant attempted to prove an understanding with S. A., one of the agents of the landlords, by which

he should be permitted to remain on the premises until the company should build on the land. It was urged that the tenant had a colour of right to the possession of the premises, and that his right could not be tried on this application:—*Held*, that the tenant occupied the premises in question under a lease from week to week, that it was duly terminated by the landlord, and that the tenant continued to overhold without colour of right after written demand of possession by the landlord. Order to issue for writ of possession. No costs.—Whether there is colour of right or not, and what constitutes colour of right, are matters of law to be determined by the Judge: *Wright v. Mattison*, 59 U. S. R. 60. To constitute a colour of right there must be some *bond fide* question of right to be tried: *Price v. Guinane*, 16 O. R. 264. The tenant had not shewn any claim which should be construed as a colour of right. *In re Canadian Pacific R. W. Co. and Lechtzier*, 23 Occ. N. 339.

**2. Writ of possession—Prohibition to County Judge and sheriff—[Certiorari.]**—After an order had been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ has been issued, the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff:—*Held*, per STREET, J., that proceedings under the Overholding Tenants Act can be removed into the High Court only when s. 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief.—Per BRITTON, J., that whether s. 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court. *In re Warbrick v. Rutherford*, 23 Occ. N. 326, 6 O. L. R. 430.

## VI. RENT.

**1. Action for—Abandonment of part of claim—Amendment—Desistment—Rescission of lease.]**—Where a plaintiff renounces a part of the conclusions of his action, and amends accordingly, such proceeding on his part is in reality a desistment and must be treated as such.—2. An action for the rescission of a lease is of a different nature from an action for rent, and a plaintiff who has at first simply claimed a certain amount of rent, cannot amend his declaration with the object of asking the rescission of the

lease, because such amendment would change the nature of his action. *Lachance v. Desbiens*, Q. R. 23 S. C. 524.

**2. Ground rent—Arrears—Movable or immovable—Promise to pay—Acceptance.]**—A ground rent established before the coming into force of the Civil Code, even if it were immovable under the law as it existed at the time the rent was settled, has become movable by the operation of the Code, under the provisions of which it is convertible into money, and redeemable, and consequently movable: Arts. 388, 389, 390, 391, C. C.—2. Where there is a personal promise by the purchaser to pay the rent to the vendor at a given date each year, there is a personal liability to pay the amount so soon as the time has elapsed, and the arrears are movable.—3. Acceptance of such promise, by the person by whom the rent was created, is sufficiently established by the fact that he received payments and gave receipts to the purchasers in their own names, and entered them in his books as owing the amount. *Lavolette v. Toupin*, Q. R. 21 S. C. 538.

**3. Ground rent—Prescription—Renunciation—Acknowledgment—Heirs—Costs.]**—The prescription of five years applies to arrears of a *rente foncière*.—2. To effect a renunciation of an acquired prescription, both an acknowledgment of the debt and a promise to pay such debt are necessary.—3. The heirs or legal representatives of a party who bound himself by deed to pay a *rente foncière*, are not jointly and severally liable for the payment of the rent unless expressly declared to be so.—4. Nor are they jointly and severally liable for the costs of an action brought against them in respect of such rent. *Ursuline Reverend Religious Ladies v. Lampson*, Q. R. 22 S. C. 7.

See also *ante* III. 6, 9, 15, 17.

## VII. OTHER CASES.

**1. Destruction of building—Fire—Accident—Negligence—Presumption of fault—Burden of proof.]**—One of the covenants of the lease from plaintiff to defendant provided that the tenant should deliver up the premises, at the expiration of the lease, "in as good order, state, and condition as the same may be found in at the commencement of the same, reasonable wear and tear, and accidents by fire, excepted." The building was destroyed by a fire, the origin or cause of which was not definitely determined. In an action by the lessor to recover from the lessee the value of the building destroyed, less the amount of the insurance money received:—*Held*, affirming the

judgment in Q. R. 21 S. C. 1, that a fire in the leased premises, the cause of which is unknown, or not legally proved, is an accident within the meaning of the above-mentioned clause in the lease excepting "accidents by fire."—2. In such case there is no presumption of fault against the lessee, where a fire occurs the origin of which is unknown, but rather a presumption of absence of fault, and the burden of proving fault is on the lessor.—3. Even assuming that the burden of proving absence of fault was on the lessee, he had succeeded in doing so in the present case. *Ford v. Phillips*, Q. R. 22 S. C. 296.

**2. Work done on demised premises—Materials furnished to tenant—Liability of landlord.**—A person who furnishes materials to a tenant for additions or improvements to the house upon the demised premises, has no right to bring an action against the owner to recover payment for such materials. *Dezile v. Marier*, Q. R. 23 S. C. 521.

### LAW STAMPS.

See COMPANY, III. 10 — PLEADING, VII. 7.

### LEASE.

See FRAUD AND MISREPRESENTATION — LANDLORD AND TENANT, III. — LISEPENDENS, 1—MINES AND MINERALS, 6, 9 — MUNICIPAL CORPORATIONS, XVI. 8—PARTITION, 2 — PLEADING, VIII. 2.

### LEGACY.

See ATTACHMENT OF DEBTS, I. 3, 4—WILL.

### LEGITIMATION.

See DISTRIBUTION OF ESTATES, 5.

### LIBEL.

See DEFAMATION, I.

### LICENSE.

See CONSTITUTIONAL LAW, 2, 3—COPYRIGHT, 2 — LIQUOR LICENSE ACT—MINES AND MINERALS, 5, 8—MUNICIPAL CORPORATIONS, II. XV. — PILOTS, 2—RAILWAY, VI. 3 — SALE OF GOODS, VI. 1.

### LICENSE COMMISSIONERS.

See LIQUOR LICENSE ACT.

### LICITATION.

See OPPOSITION, 3.

### LIEN.

**1. Goods of lodger—Money due for medical services.**—The right of retention of the movable effects of a lodger can only be exercised by the persons specially mentioned in Art. 1816 (a), C. C.—2. One who has made himself responsible to a physician for professional services rendered to a lodger, has not a right of retention of the effects of the latter for the value of such services. *Goulet v. Brunelle*, 5 Q. P. R. 223.

**2. Thresher's lien on grain—Measurements—Weights and Measures Act—Illegality—"Dealing."**—The defendant contracted with the plaintiff to thresh his grain at a price per bushel. The quantity threshed was not measured with a Dominion standard measure, or weighed, but was subsequently ascertained by the defendant by cubic measurement:—*Held*, that so measuring the grain was not a "dealing" within the meaning of s. 21 of the Weights and Measures Act, which could relate back and render the contract void, and that the defendant was not therefore disentitled to a lien under the Threshers' Lien Ordinance. *Macdonald v. Corrigan*, 9 Man. L. R. 284, and *Montoba Electric and Gas Light Co. v. Gerrie*, 4 Man. L. R. 210, considered.—Judgment of WETMORE, J., 22 Occ. N. 345, reversed. *Conn v. Fitzgerald*, 5 Terr. L. R. 346.

**3. Thresher's lien on grain—Price of threshing other grain—Seizure of excessive quantity — Notice of claim of lien.**—A thresher cannot, under the Threshers' Lien Act, 57 V. c. 36, maintain a lien on grain for the threshing of which he has been paid, to recover the price of a subsequent unpaid threshing.—The plaintiff, by his notice put up on the granary, asserted his claim to a lien upon all the grain contained in it, which was worth about \$86; but the Court found that the amount of the claim for threshing for which he could, under the Act, at the time of the posting of the notice, enforce a lien on such grain, if the proper steps were taken, was only about \$26:—*Held*, that the quantity of grain which the plaintiff attempted to retain was unreasonably large for the amount owing,



and that, under s. 2 of the Act, he had forfeited his right of retention of any of it. *Simpson v. Oakes*, 23 Occ. N. 54, 14 Man. L. R. 262.

**4. Woodman's lien — Collusion—Fraud — Appeal — Attachment — Demand—Service—Sheriff's fees.]**—In proceedings under the Woodmen's Lien Act, 1894, an order allowing the claimants' lien will be set aside if the evidence discloses an attempt on the part of the claimants acting in collusion with the defendant to defraud the owners, notwithstanding that the Judge in the Court below has found that the evidence established the claimants' lien.—Under s. 6 of the Act there must be a demand of the specific amount due before the issue of the attachment.—Where attachments for three claims are served by the sheriff at the same time and place, the sheriff is entitled to full fees, including mileage, on each writ. *Murchie v. Fraser*, 36 N. B. Reps. 161.

**5. Woodman's lien—Lumber.]**—By the Woodman's Lien for Wages Act, B. C., no lien is given to saw-mill men, but only to those engaged in getting timber out of the forest. *Davidson v. Frayne*, 9 Brit. Col. L. R. 369.

**6. Woodman's lien—Notice of lien —Effect—Owner of limits.]**—A person who has done work for the jobber of a lumberman, and given the notice required by Art. 1994c, C. C., is a creditor of the latter. *Rh  aume v. Batiscan River Lumber Co.*, Q. R. 23 S. C. 71.

**7. Woodman's lien—Subject of lien —Hire of horse.]**—The lien given by Art. 1994c, C. C., is given only to a workman who has worked in getting out wood, and he has it only for his wages; it is not given to one who is merely a creditor for the hire of a horse employed to cart the wood. *Rh  aume v. Batiscan River Lumber Co.*, Q. R. 23 S. C. 166.

See COSTS, IV.—FIXTURES, 2—FRAUDULENT CONVEYANCE, 1—MECHANICS' LIENS—MORTGAGE, 1—REGISTRY LAWS, 1—SOLICITOR, 4.

## LIFE ESTATE.

See WAY, II.

## LIFE INSURANCE.

See INSURANCE, III.

## LIFE RENT.

See ATTACHMENT OF DEBTS, I. 5.

## LIMITATION OF ACTIONS.

### I. CLAIM TO REALTY.

#### II. OTHER CASES.

See ASSESSMENT AND TAXES, I, II. 2, VI. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 15, 16, 17—CROWN, I. 1, III. 5—DEFAMATION, I. 2—EXECUTORS AND ADMINISTRATORS, 3—INTEREST, 4—JUDGMENT, I. 1, IV. 5—LANDLORD AND TENANT, VI. 3—MUNICIPAL CORPORATIONS, VI. 2—PEREMPTION—SOLICITOR, 8—TENANTS IN COMMON—TRESPASS TO LAND, 4—TRUSTS AND TRUSTEES, 4—WATER AND WATERCOURSES, 1, 5—WAY, II. 2—WRIT OF SUMMONS, II. 3.

### I. CLAIM TO REALTY.

**1. Possession—Both parties claiming title by—Findings of jury.]**—Where each party is seeking to make a title to land by possession, the Court will not interfere with the findings of the jury unless the verdict is one which, the whole of the evidence being reasonably viewed, could not properly have been found. *Wood v. Le Blanc*, 36 N. B. Reps. 47.

**2. Possession—Title.]**—In 1821 M. obtained a grant of land from the Crown, and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years, when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons, who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed to B., who proceeded to cut timber from it. In an action of trespass by P.:—*Held*, that the jury at the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for twenty years before 1870, and that his possession had ripened into a title. If not, the deed to his sons in 1870 gave them exclusive possession, and, if they had not a perfect title then, they had twenty years after, in 1890. *Benrley v. Peppard*, 23 Occ. N. 212, 33 S. C. R. 444.

### II. OTHER CASES.

**1. Account—Claim against estate of deceased person—Corroboration—Special agreement—Running account—Terms of credit—Demand—Fraud upon creditors—Pleading.]**—The plaintiff claimed from

the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1896. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1896. This action was begun on the 4th May, 1901.—The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money, and to leave it in the hands of the deceased, who said he would save it for the plaintiff and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go in to the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinctly, was given by another witness:—*Held*, that there was sufficient corroboration of the plaintiff's statement:—*Held*, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least until the plaintiff demanded it; and, as there was no demand before the 16th May, 1896, the action was in time:—*Held*, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it: *Day v. Day*, 17 A. R. 157. *Wilson v. Howe*, 23 Occ. N. 137, 5 O. L. R. 323.

**2. Building—Faulty construction—Action against architect or contractor—Starting point.]**—The prescription of an action against the contractor or architect for the total or partial loss, within 10 years, of a building constructed by them, has for its starting point the manifestation within the 10 years of the fault in the construction or in the soil, and such right of action endures for 30 years from the time of the manifestation of such fault. *Archambault v. Curé and Church-wardens of St. Charles de Lachenaie*, Q. R. 12 K. B. 349.

**3. Mortgage—Cause of action—Acceleration.]**—The effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured the principal thereby secured shall become payable, is to make the principal at once due, so that the

cause of action then accrues under s. 1 of R. S. O. 1897 c. 72. *McFadden v. Brandon*, 6 O. L. R. 247.

**4. Sale of goods — Action to set aside—Period allowed for — Pleading—Costs.]**—An action to set aside a contract for the sale of machines, begun more than a year after the making of the contract, cannot be maintained in face of Art. 1530, C. C.; but, if the defendant does not set up this ground until the hearing, after having specially pleaded that the machines were good and such as were warranted to do the work for which they were sold, which has not been established, the purchaser having on the contrary proved that they were worth nothing, the defendant, while successful in having the action dismissed, will nevertheless be ordered, on account of his pleading, to pay the costs of his trial, including witnesses, etc. *Vallière v. Patent Development and Manufacturing Co.*, Q. R. 21 S. C. 526.

**5. Simple contract debt — Conversion into specialty debt—Evidence of—Deed.]**—Default having been made in the payment of two promissory notes held by a bank, a trust deed was executed in 1884, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed recited the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor; and the father thereby conveyed the same to the trustee as security in the first place for the indebtedness of defendant to his father, then for that to the bank, power being given to the trustee to sell the said lands on one month's default in payment and on notice in writing by the trustee of his intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay same. In 1893, written notice having been given by the trustee of his intention to sell, a deed of release of all his interest in the said lands was given by the defendant to the bank, the deed reciting that it was made to save the expense of a sale:—*Held*, that neither the trust deed nor the deed of release converted the debt into a specialty debt, and so the defendant could validly set up the Statute of Limitations as a bar to an action brought in 1902. *Bank of Montreal v. Lingham*, 23 Occ. N. 197, 5 O. L. R. 519.

## LIQUIDATOR.

See BANKS AND BANKING, 4 — COMPANY, III. 4, 5, 9—COSTS, VI. 6—PARTNERSHIP, 3.

## LIQUOR ACT OF ONTARIO.

**1. Conviction** — *Removal by certiorari—Commitment—Invalidity—Amendment—Act relating to justices—Irregularities—Names—Sentence—Adjudication—Fine.*—The defendant was convicted on the 3rd February, 1903, before a Judge designated under s. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of \$400. On the same day a warrant was issued by the Judge committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of *certiorari* was issued to the Judge and a County Crown attorney commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant:—*Held*, that the proceedings against the defendant were removed from the Court below by the issue and service of the *certiorari*, and that the subsequent proceedings were void.—By 2 Edw. VII. c. 12, s. 15 (O.), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under Provincial Acts:—*Held*, not to apply to proceedings under the Liquor Act, 1902.—*Scmble*, that, in a conviction of this kind, it was no objection, on *habeas corpus*, that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forster."—*Scmble*, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. *Rex v. Foster*, 23 Occ. N. 228, 5 O. L. R. 624.

**2. Procuring personation of voter** — *Ontario Election Act, 1902, ss. 167, 168—Procuring person to vote knowing that he has no right.*—The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day, upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question:—*Held*, that the conviction was justified under s. 168 of the

Ontario Election Act, R. S. O. 1897 c. 9 (made applicable by s. 91 of the Liquor Act), although the evidence shewed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a voter at such polling place. Section 167 (1) makes the counselling or procuring of personation a corrupt practice, but does not provide a punishment; and s. 168 is in terms wide enough to cover the offence. *Rex v. Coulter*, 23 Occ. N. 280, 6 O. L. R. 114.

**3. Referendum** — *Voting—Corrupt practices—Place of trial—Jury—Conviction—Sentence—Imprisonment—Penalty—Costs—Form of conviction—Habeas corpus—Warrant of commitment.*—The provisions of s.-ss. (2) and (3) of s. 91 of the Ontario Liquor Act, 1902, are amplifications of the provisions of the Ontario Election Act which are incorporated in the Liquor Act; and the Judge (appointed under s. 91 (4)) in this case did not exceed his powers in sentencing the accused, whom he found guilty of personation, to one year's imprisonment in addition to the payment of a penalty of \$400 and costs.—The jurisdiction is to try at any place in Ontario, and, it appearing in the order of conviction that the trial was held under the Act, and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York, at the city of Toronto, the order shewed jurisdiction, although it did not specify the place of trial.—It was immaterial that the order of conviction was intitled in the High Court of Justice, and that it did not shew the informer's name, the County Crown Attorney of the county of York being shewn to be the prosecutor. Nor was it material that the date of the offence was not shewn, the time for conviction not being limited by statute.—The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of \$400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid:—*Held*, that upon *habeas corpus* proceedings within the year, the objections that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered; but the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year.—The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a tax-

ing officer. *Res v. Carlisle*, 23 Occ. N. 321, 6 O. L. R. 718.

See CONSTITUTIONAL LAW, 9, 10 —  
MANDAMUS, 2.

## LIQUOR LICENSE ACT.

I. MANITOBA.

II. NEW BRUNSWICK.

III. NORTH-WEST TERRITORIES.

IV. NOVA SCOTIA.

V. ONTARIO.

VI. QUEBEC.

See INDIAN — MUNICIPAL CORPORATIONS, I. 4—SALE OF GOODS, VI. 1.

### I. MANITOBA.

**Local option by-law**—*Ultra vires in part — Enforcement of valid part — Refusal of license — Change of municipal boundaries.*] — A by-law of the former municipality of Brenda provided that no license should be granted by the commissioners for the sale of liquors within the limits of the municipality, and that the municipality should not receive any money for a license for such purpose. A. applied for a hotel license in Napinka, which was in the limits of Brenda as it existed, and it was refused on account of the by-law. In 1890 the former division into municipalities was superseded by a new one. The municipality of Brenda disappeared, and the territory formerly comprising it was divided between two rural municipalities, Winchester and Arthur. By 53 V. c. 52, s. 81, it was provided that in case in any of the territory changed as to its municipal situation, a by-law under s. 51 of c. 52 of 52 V. is in force, such by-law shall continue to affect such territory:—*Held*, that the illegal part of the by-law could be disregarded; that there was no power to pass a by-law to prohibit the sale of liquors, or the issue of a license therefor. Two separate things were prohibited, one of which the municipality had no direct power to prohibit. There was, however, a clear intention to enact what the council was empowered to enact. If a by-law is good in part and bad in part, it is valid as to the good part, when each of the two parts is entire and distinct.—The case came within the language of 53 V. c. 52, s. 81: that statute was intended to cover a case like the present. *Res v. License Commissioners for License District No. 1, Re Anderson*, 23 Occ. N. 270.

## II. NEW BRUNSWICK.

**Conviction — Minute — Period of imprisonment — Seizure of liquor — Disposal of proceeds.]—A conviction will not be quashed because the minute awarded an imprisonment of thirty days, while the section of the Act under which the conviction was made limited the time of imprisonment to one month.—Under 60 V. c. 6, s. 12 (N. B.), it is not necessary for the magistrate to specify in his order any particular public hospital in which the proceeds derived from the sale of liquor seized by reason of its being illegally kept for sale, are to be paid. *Res v. McQuarrie, Es p. Rogers*, 36 N. B. Repts. 39.**

### III. NORTH-WEST TERRITORIES.

**Conviction — Jurisdiction — Single justice of the peace — "May" — Criminal Code.]—The Liquor License Ordinance (No. 18 of 1891-92) provides by s. 105 that "all informations or complaints for prosecution of any offence against this Ordinance, except as herein specially provided, shall be laid or made . . . before a justice of the peace," and by s. 106, that "such prosecution may be brought for hearing and determination before any two justices of the peace."—The Criminal Code, part LVIII. (Summary Convictions), which has been made applicable to summary proceedings under the Liquor License Ordinance, provides (s. 842) that "every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf," and that, "if there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by one justice:—*Held*, on an appeal from a conviction, that s. 106 constituted a "direction" that prosecutions should be heard, etc., before two justices of the peace, and that, therefore, one justice had no jurisdiction to convict, except in the certain cases specially provided for in the Ordinance. *Regina v. Wilson*, 2 Terr. L. R. 79.**

### IV. NOVA SCOTIA.

**Witness — Conviction for non-attendance — Proof of tender of witness fees.]—The defendant was summoned to appear as a witness on behalf of the prosecution at the trial of a complaint under the Liquor License Act, R. S. N. S. 1900 c. 100. He did not appear, and**

afterwards a summons was issued requiring him to appear to answer to the charge of refusing or neglecting to attend as a witness. He appeared, and, after hearing evidence in support of the charge, the justices convicted the defendant, and imposed a fine of \$5 and costs:—*Held*, setting aside the conviction with costs, that the defendant could not be made liable for the penalty imposed by the Act, s. 161 (2), in the absence of proof that the proper fees were tendered to him before he was required to give evidence. *Ree v. Chisholm*, 35 N. S. Reps. 505.

#### V. ONTARIO.

##### **Powers of license commissioners**

— *Resolution prohibiting games of chance in licensed premises* — “*Euchre*”

— *Knowledge of licensee* — *Conviction* — *Form* — *Distress* — *Imprisonment* — *Costs*.]—A board of license commissioners, under the authority of the Liquor License Act, R. S. O. 1897 c. 245, s. 4, s.s. 4, passed a resolution “that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . on the premises:”

—*Held*, McMAHON, J., dissenting, that the powers of the commissioners under s. 4 were not restricted by s. 81, and that the resolution was within their powers.—Four persons played “euchre” for amusement in a room behind the bar of the defendant’s hotel, the cards used being the property of one of the players, a boarder in the hotel:—*Held*, that “euchre” is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge:—*Held*, also, that s. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress and in default of distress imprisonment, was authorized:—*Held*, also, that where the license inspector attends Court as prosecutor he is to be allowed certain expenses by way of costs, as provided in s. 117, and there was nothing wrong in the amount (\$4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction. *Ree v. Laird*, 23 Occ. N. 281, 6 O. L. R. 180.

#### VI. QUEBEC.

**1. Confirmation of licenses** — *Necessity for notice* — *Imperative statute*.]

—The Liquor License Act of Quebec, requiring on the part of a municipal council, at the time of the confirmation of certificates of license, a preliminary notice, is imperative and of public order, and the absence of such notice will justify any one interested in demanding the setting aside of the confirmation of such certificate within the time and in the manner indicated by the Municipal Code. *Village of Plessisville v. Moffet*, Q. R. 12 K. B. 418.

**2. License fee** — *Amount of* — *Fees fixed by municipal charters* — *Conflict*.]—The statute amending the Liquor License Act of Quebec, 54 V. c. 13, which enacts that the municipal councils of cities, towns, villages, and other municipal local authorities cannot impose by by-law, resolution, or otherwise a tax, impost, or fee, exceeding in any year the sum of \$50, upon a person holding a license under that statute, whether for a confirmation of a certificate to obtain the license, or otherwise for the object for which he possesses such license, has not the effect of abrogating the provisions of particular charters permitting municipal corporations to impose a higher tax. *Town of Farnham v. Roy*, Q. R. 12 K. B. 237; *Hogan v. City of Montreal*, ib. 251.

#### LIS PENDENS.

**1. Lease** — *Damages* — *Breach of covenants* — *Cancellation*.]—The defendant in an action for damages for breaches of covenants in a lease cannot plead as *lis pendens* the pendency of an action for damages arising from the cancellation of the lease. *Larue v. Couture*, 5 Q. P. R. 460.

**2. Promissory note** — *Revendication* — *Action for account and partition*.]—It is not a ground for staying an action *en revendication* of a promissory note, that an action for account and partition of property, of which this note is a part, is pending at the time. *Legault v. Legault*, 6 Q. P. R. 32.

See BANKRUPTCY AND INSOLVENCY, I. 8—COSTS, I. 4—JUDGMENT, I. 2—SOLICITOR, 4—VENDOR AND PURCHASER, 3.

#### LOCAL BOARD OF HEALTH.

See MUNICIPAL CORPORATIONS, XIII. 2.

#### LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, XVI. 6.

**LOCAL OPTION.**

See LIQUOR LICENSE ACT, I.—MUNICIPAL CORPORATIONS, I. 4.

**LOCAL REGISTRAR.**

See PARLIAMENTARY ELECTIONS, II. 2.

**LOCATION TICKET.**

See CROWN, I. 1.

**LORD CAMPBELL'S ACT.**

See DAMAGES, 4, 5—MASTER AND SERVANT, II.

**LORD'S DAY ACT.**

See SUNDAY.

**LOST NOTE.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 12.

**LOST WILL.**

See WILL, III. 2.

**LOTTERY.**

See CONTRACT, III. 1.

**LUNATIC.**

1. *Committee — Funds in hands of — Payment into Court — Reference — Report of Master — Revision of costs.*—The rule has for many years been that when the Court intervenes in respect to the property of persons not *sui juris*, the money shall not be left to private investment, but shall be paid into Court, and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed.—The general rule to be observed by local officers, when it is advisable that the estate should be realized and turned into money, is, that the fund so realized shall

be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court, that proper directions may be given.—In two cases where local Masters had reported schemes for the maintenance of lunatics, and made provision for the moneys of the estates being collected by the respective committees, and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—*Held*, that it is imperative that the costs in lunacy matters be revised by the proper officer in Toronto; and that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court. *In re Norris, In re Drope*, 23 Occ. N. 49, 5 O. L. R. 99.

2. *Interdiction — Conseil judiciaire — Appeal.*—The prothonotary or the Judge may, upon a petition for interdiction for lunacy, do no more than appoint a *conseil judiciaire* for the respondent.—2. An appeal lies to the Judge from the decision of the prothonotary so naming a *conseil judiciaire*. *Ledoux v. Meunier*, 5 Q. P. R. 249.

3. *Party to cause — Curator — Appointment of new one — Appeal — Stay of proceedings.*—If, while a cause is standing for judgment, one of the parties, an interdict, is relieved from interdiction, and subsequently is again made an interdict, and a new curator is appointed for him, an appeal, in case of a judgment unfavourable to him, cannot be brought by the old curator; and a stay of proceedings will not be ordered to allow the new curator to obtain the authorization required by law. *Leduo v. Parish of St. Louis de Gonsague*, 5 Q. P. R. 446.

See DOWER, 2—HUSBAND AND WIFE, VII. 2—INTERDICT—PARTITION, 4.

**MAINTENANCE.**

See ATTACHMENT OF DEBTS, I. 1—HUSBAND AND WIFE, III. 1—PAUPER, 1—WILL, I. 2, II. 9.

**MALICIOUS PROSECUTION.**

1. *County Courts Act. B. C., ss. 23, 31—Waiver of objection to jurisdiction—False imprisonment — Interference by complainant.*—The plaintiff took possession of the defendant Mason's float,

which he found adrift on a lake. Mason, although aware that the plaintiff claimed a lien for salvage, made no move towards recovering the float until after three weeks, when he, in company with a constable, demanded it, and on the plaintiff refusing to give it up without compensation, he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under s. 338 of the Code for taking and holding timber found adrift, was dismissed. Mason provided the tug which got the float and carried the plaintiff to gaol, and accompanied the constable with the plaintiff to the gaol:—*Held*, on the facts, that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment. — An action for malicious prosecution was tried in a County Court, which has no jurisdiction to try such an action unless a signed agreement consenting thereto is entered into by the parties. No signed agreement was shewn, but the action was tried without objection by either party, and judgment was given in favour of the plaintiff:—*Held*, that the question of the jurisdiction of the County Court could not be raised on appeal. *Robitaille v. Mason*, 23 Occ. N. 205, 9 Brit. Col. L. R. 499.

**2. Findings of jury — Damages — Issue of warrant—Absence of malice—Evidence — Misdirection — Mistake of magistrate.]** — The mere finding by the jury, in an action for malicious prosecution, that the plaintiff did suffer damages, and fixing the amount of the damages, is not a ground for a condemnation to pay such damages. And where the jury find, in addition, that the warrant of arrest was issued by the magistrate as being, in his opinion, the proper means of giving effect to the information, and in accordance with the practice of the police office; that the complaint was not dismissed on the merits, but because the case was not, in the opinion of the magistrate, one in which the law allowed the issue of a warrant; that the facts alleged in the information and complaint were not true, but that the defendants (complainants) used proper care to inform themselves of the facts of the case, honestly believed the same, and were not actuated by malice—the verdict is really a verdict for the defendant.—2. Complaint of rejection of evidence is not well founded where the record shews that proof of the facts desired to be proved by the evidence alleged to have been rejected has really been made in the cause.—3. A direction by the Judge presiding to the effect that “if the magistrate made a mistake, the defendants, unless they acted

maliciously and without probable cause, could not be held, because it would be preposterous to suppose that a person applying in proper form for a remedy should be responsible for the mistake of a magistrate.” is well founded in law.—4. The Judge at the trial is not bound, and is right in refusing, to instruct the jury when they come in with their verdict, that it is their duty to find the defendant at fault on some one of the special facts, before they can award damages. *Martin v. Montreal Gas Co.*, Q. R. 23 S. C. 222.

**3. Issue of warrant for arrest—Advice of advocates—Malice—Reasonable and probable cause—Bailiff—Notice.]**—Even assuming that a bailiff is a public officer within the meaning of Art. 88, C. P., in this case the bailiff had no right to the notice required by that Article, inasmuch as what he did was not done in the exercise of his public functions.—2. The responsibility of the informant who causes a warrant to be issued against a person, is not removed by the fact that he acted on the advice of his advocates, even when the facts of which he informs his advocates, and which thereby become the basis of the warrant, are true; if they are false, it must be inferred that there was malice and absence of probable cause. *Lachance v. Casault*, Q. R. 12 K. B. 179.

**4. Malice — Prosecution before interested magistrate — Town councillor — Duties of — “Person” — By-law — “Excavation.”]**—A member of a town council, who is also chairman of the road committee of the town, has a right and is in duty bound to make himself acquainted with the details of municipal administration, and does not exceed the limits of his duty in causing the snow to be temporarily removed from some of the manholes, for the purpose of having the depth of the drains at these points measured.—2. The word “person” in a municipal by-law enacting that no person shall cause any excavation to be made in the streets without the permission in writing of the council and payment of a fee, does not include a member of the council acting within his administrative rights, and the word “excavation” does not include the removal and replacing of snow by him, to obtain information necessary to guide him in the performance of his municipal duties.—3. A member of the council who had seconded a resolution ordering the prosecution of a fellow member for the act above mentioned, had no jurisdiction as a magistrate to summon and try him, and the taking by the council of such proceeding before a person so

disqualified was an element of malice, and the circumstances above stated established want of probable cause. *Therrien v. Town of St. Paul*, Q. R. 23 S. C. 248.

**5. Reasonable and probable cause — Nonsuit — Search warrant — Theft — Information — Amendment.]** — A dog having been claimed by the plaintiff and taken from the defendant, the latter stated the facts to a magistrate, who drew an information that plaintiff did "unlawfully have and keep in his possession and take away a black collie dog, the property of the complainant," which was sworn to by the defendant. The magistrate issued a search warrant, under which a constable took the dog out of the plaintiff's possession. The constable then laid an information against the plaintiff in the same terms as the former one, and the plaintiff was summoned. Before the magistrate the plaintiff's counsel objected that the information and summons did not charge the plaintiff with any offence, and at the request of the defendant and his counsel the information was amended by inserting the words "steal and take away." The magistrate dismissed the charge. In an action for malicious prosecution:—*Held*, that the defendant, having fairly stated the facts to the magistrate, was not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue the search warrant, nor for summoning the plaintiff apparently to dispose of the question as to the property in the dog:—*Held*, also, that there was evidence that the defendant assented to the alteration charging the plaintiff with the crime of theft and his prosecution on that charge, and that the defendant was not justified in charging the plaintiff with having stolen the dog, because he believed the dog was his own; that the real question was not whether he believed that the plaintiff had stolen him, that is, taken him without any belief that he had the right to take him; and that the trial Judge should have left the case to the jury, telling them that, if they found that the defendant had authorized the charge of theft and honestly believed when the amendment was made that the plaintiff had stolen his dog, they should find for the defendant; otherwise they should find for the plaintiff; the case should not have been taken from the jury upon the ground that reasonable and probable cause for a criminal prosecution had been shown; and a new trial was ordered. *Pring v. Wyatt*, 23 Occ. N. 191, 5 O. L. R. 505.

See APPEAL, X. 12—NOTICE OF ACTION, 3.

## MANDAMUS.

**1. Election Act, R. S. M. 1902 c. 52—Revising officer—Duties — Board of registration functus officio.]**—A revising officer appointed to revise and close the lists of electors under the Manitoba Election Act, R. S. M. 1902 c. 52, although directed by the board of registration to hold his sitting for that purpose on a certain day and between certain hours, has power to continue the sitting to a later hour and on a subsequent day or days if necessary to enable him to hear and dispose of all applications brought before him.—Where, however, it was shewn that, before the hearing of the application for a mandamus to the revising officer to compel him to re-open his court for the purpose of hearing further applications to be placed on the lists, he had, pursuant to s. 92 of the Act, transmitted the list of electors and all books and papers to the chairman of the board of registration, and that, before the final argument of the motion, the chairman had, pursuant to s. 97 of the Act, sent the revised lists to the King's printer, and the books, documents, and other papers to the clerk of the executive council:—*Held*, that the issue of a mandamus to the revising officer as asked for should be refused, as it would be fruitless and futile, and both he and the board of registration were *functus officio*.—*Reo v. Bishop of London*, 1 Wils. 11. *Rep v. Bishop of Exeter*, 2 East 466, and *Reo v. Bateman*, 4 R. & Ad. 553, followed. *In re Bonnar*, 23 Occ. N. 251; *Reo v. Bonnar*, 14 Man. L. R. 467.

**2. Police magistrate — Sentence — Ontario Liquor Act, 1902—Voting on Personation — Information — Deputy returning officer — Prosecutor — Applicant for mandamus—Status.]**—At the voting upon the Ontario Liquor Act, 1902, the defendant presented himself at a polling place and asked for a ballot in the name of another person, whereupon, before the defendant had left the polling place, one Stewart laid an information before the deputy returning officer charging the defendant with personation, and on this information the deputy issued his warrant, under which the defendant was arrested and brought before a police magistrate. The deputy then laid an information against the defendant for personation, and the defendant was tried by the magistrate, convicted, and sentenced:—*Held*, that, having regard to the provisions of R. S. O. 1897 c. 10 (made applicable by s.s. (5) of s. 91 of the Ontario Liquor Act, 1902), the information which gave the magistrate jurisdiction was that laid by Stewart; and the deputy returning officer had no status to apply for a mandamus to the magistrate to impose a



different sentence. — *Per* BRITTON, J., that a mandamus could not be granted for that purpose. *In re Denison, Rex v. Case*, 23 Occ. N. 279, 6 O. L. R. 104.

See APPEAL, X, 12—MUNICIPAL CORPORATIONS, II, 2, 3, III, 1, VII, 2, XVI, 3—SCHOOLS, 1, 5.

### MANDATE.

See PRINCIPAL AND AGENT, 2, 4.

### MANITOBA ELECTION ACT.

See MANDAMUS, 1.

### MANITOBA GRAIN ACT.

See CRIMINAL LAW, II, 7.

### MANSLAUGHTER.

See CRIMINAL LAW, II, 8.

### MARINE INSURANCE.

See INSURANCE, IV.

### MARITIME LAW.

See SHIP.

### MARRIAGE.

**Officer competent to celebrate — Power of Court to order.**—The Court, or a Judge, has no authority to order an officer competent to celebrate a marriage to do so, unless such officer is properly brought before the Court or Judge. *Ex p. Fleet*, 6 Q. P. R. 42.

See COURTS, V, 1—CRIMINAL LAW, II, 2 — EVIDENCE, III. — HUSBAND AND WIFE.

### MARRIAGE CONTRACT.

See HUSBAND AND WIFE, V.

### MARRIED WOMAN'S PROPERTY ACT.

See HUSBAND AND WIFE, IV, 2.

### MASTER AND SERVANT.

I. DISMISSAL OF SERVANT.

II. INJURY TO SERVANT.

III. OTHER CASES.

See CONTRACT, IV, 2, VIII, 3—COURTS, IX, 10—CRIMINAL LAW, IV, 3 —CROWN, IV, 2.

#### I. DISMISSAL OF SERVANT.

**1. Absence of notice — Misconduct — Prejudice.**—In order that an employee may be discharged without notice, his conduct must be such as to cause a prejudice to his employer, or to give the latter reasonable cause to fear that he will suffer a prejudice by reason of the acts of the former. *Millan v. Dominion Carpet Co.*, Q. R. 22 S. C. 234.

**2. Damages—Future commissions.**—The plaintiff was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause, sales to a large amount having up to that time been effected by him:—*Held*, that, in estimating the damages to which he was entitled, the commission on sales which there was reasonable ground to think might have been effected during the unexpired portion of the term should be taken into consideration.—*Judgment of FERGUSON, J.*, 4 O. L. R. 350, 22 Occ. N. 372, reversed. *Lalshley v. Gould Bicycle Co.*, 23 Occ. N. 304, 6 O. L. R. 319.

**3. Justification — Neglect of duties — Insolent language — Condonation — Evidence.**—The notice of appointment of plaintiff as janitor of a public school provided for payment of the stipulated salary, monthly, on presentation of a certificate from the principal of the school that the duties of the janitor had been satisfactorily performed:—*Held*, that a certificate from the principal of the satisfactory performance of duties condoned any previous irregularity, misconduct, or neglect of plaintiff which properly came under the cognizance of the principal.—Nevertheless, evidence of such previous acts might be given to shew that the act

which led directly to the dismissal was not a solitary instance, but that the employee had been habitually guilty.—Non-compliance with the printed regulations furnished the plaintiff as to the duties required of him in respect to sweeping, dusting, etc., and impertinent and insulting language used towards members of the board of school commissioners, afforded sufficient ground for the immediate dismissal of the plaintiff from his position. *Cook v. Halifax School Commissioners*, 35 N. S. Reps. 405.

## II. INJURY TO SERVANT.

**1. Contract as to liability—Railway company—Provident society—Release of claim—Rights of widow—Nullity—Indemnity or satisfaction—Motion for judgment—Peremption.]**—1. The provisions of Art. 494, C. C. P., are not on pain of nullity, and failure to move for judgment in accordance with the verdict of a special jury until after the lapse of the time prescribed by this Article, does not deprive the party of the right to a judgment, unless the action itself has been declared perempted for failure to proceed therein during two years.—2. A railway company cannot, under a contract between their employee and an insurance and provident society, in consideration of an annual subscription to such society, be exempted from responsibility for damages caused by neglect and failure on their part to comply with a duty imposed on them by law for the safety of passengers and employees, e.g., equipment of the cars with efficient brakes, such stipulation being without effect under s. 243 of the Railway Act of Canada, 51 V. c. 29.—3. The right of the widow and other relatives under Art. 1056, C. C., is not a representative one, but is independent of that of the injured person; and, therefore, even if an agreement stipulating immunity from responsibility for damages caused by *faute lourde* were valid as regards the injured person, it would be without effect as regards his widow or other persons having rights under Art. 1056, C. C.—4. An agreement exempting a party from responsibility for damages caused by his gross negligence, or *faute lourde*, is null and void, as being contrary to public order.—5. The words "indemnity or satisfaction," in Art. 1056, C. C., imply compensation by the person responsible for the damage suffered, and not a payment made under a contract with an insurance society.—Judgment in Q. R. 21 S. C. 346 affirmed. *Grand Trunk R. W. Co. v. Müller*, Q. R. 12 K. B. 1.

**2. Contributory negligence—Action by widow—Pleading—Reply—Railway.]**—In an action for damages by the widow of a railway conductor against the railway company for the death of her husband, where the defendants plead that the victim took no steps to protect his own train, as required by the rules and regulations of the company, and that such negligence was the determining cause of the accident, it is not legal for the plaintiff to reply that the deceased "had done all that was customary for the employees of the said railway company defendant," and such allegation being too vague will be rejected on an inscription in law. *Leahy v. Grand Trunk R. W. Co.*, 5 Q. P. R. 350.

**3. Contributory negligence—Railway—Workman on—Neglect of rules—Cause of injury.]**—A rule of the defendants required the display of a blue signal (blue flag by day and blue light by night) while a car was being repaired on the track. Solely in consequence of the failure of the plaintiff, an employee of the defendants, to comply with this rule a train backed down while he was working at a car on the track, and he was injured.—*Held*, that the plaintiff had no claim for compensation under the circumstances. *Coullée v. Grand Trunk R. W. Co.*, Q. R. 23 S. C. 242.

**4. Employers' Liability Act, B. C.—Common employment—Former servant's negligence—Trial—Party bound by course of.]**—Where a party frames an action for negligence at common law and also under the Employers' Liability Act, but at the trial attempts to develop a case at common law and fails, he will not be granted a new trial in order to try to establish a case under the Employers' Liability Act.—The jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers, who were competent, and who had left the defendants' employment before the injured person entered their employment.—*Held*, that the defendants were not liable either under the Act or at common law.—*Per* IRVING, J.—The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service. *Hosking v. Le Roi No. 2, Limited*, 23 Occ. N. 300.

**5. Employers' Liability Act, B. C.—Dangerous place—Duty to warn work-**

men.]—G. had been working in the defendants' mine on the floors immediately below the 600-foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape, and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred, and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600-foot level, of which the superintendent was aware and G. not aware. The jury found that the superintendent was negligent, inasmuch as he did not advise G. of the probable danger:—*Held*, in an action under the Employers' Liability Act, that the defendants were liable.—Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment, and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger. *Gunn v. Le Roi*, 23 Occ. N. 291, 10 Brit. Col. L. R. 59.

**6. Employers' Liability Act, B. C.**  
—*Negligence—Common employment—Mine owner and contractor.*]—H. and M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc.; H. and M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request.—A hoisting bucket hung on a clevis was supplied to H. and M. by the defendants, and through the negligence of the defendants' superintendent, master mechanic, or shift boss, a hook substituted for the clevis by defendants, at the request of H. and M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. and M.'s workmen engaged in sinking the winze:—*Held*, that the plaintiff, being subject to the orders and control of the defendants, was acting as their servant, and the doctrine of fellow-servant applied, and the action was not maintainable. *Hastings v. Le Roi No. 2, Limited*, 23 Occ. N. 273, 10 Brit. Col. L. R. 9.

**7. Employers' Liability Act, B. C.**  
—*Negligence—Findings of fact—Machinery in mine—Defective construction—Proximate cause.*]—An elevator cage was

used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable, which ran over a sheave-wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft, and the cage was fitted with automatic dogs or safety clutches, intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty feet below the sheave-wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave-wheel with such force that the cable broke, and, the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level, and injured the plaintiff, who was engaged at the work for which he was employed by the defendants, about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the proximate cause of the injury was occasioned by the non-continuance of the guide-rails, which, in their opinion, caused the safety-clutches to fail in their action, and thereby allowed the cage to fall:—*Held*, that the Court ought not, on appeal, to disturb the verdict entered for the plaintiff, as there was sufficient evidence to support the finding of fact by the jury.—Judgment in 9 Brit. Col. L. R. 62 reversed. *McKelvey v. Le Roi Mining Co.*, 23 Occ. N. 61, 32 S. C. R. 664.

**8. Employers' Liability Act, B. C.**  
—*Notice of injury—Want of—Reasonable excuse—Prejudice—Evidence.*]—In an action for damages under the Employers' Liability Act for injuries sustained by the plaintiff, it was shewn that the plaintiff was without means and for some weeks after the accident was unable to transact any business; and that the defendants' business manager and representative saw the accident and arranged for the plaintiff's admission into the hospital, where a few days later he discussed with him the cause of the accident:—*Held*, that the circumstances excused the want of notice of injury.—At the close of the plaintiff's case a nonsuit was moved for, on the ground that the plaintiff had not proved notice of injury, and the plaintiff then adduced evidence which the Court held shewed a reasonable excuse for the want of notice, and the trial proceeded. Before closing his case the defendants' counsel tendered evidence of being prejudiced by want of notice:—*Held*, excluding the evidence, that the

proper time to shew prejudice was while the question of reasonable excuse was still open. *Lever v. McArthur*, 9 Brit. Col. L. R. 417.

**9. Employers' Liability Act, B. C.**—*Railway—Contributory negligence—Nonsuit—Jury.*—The judgment in 22 Occ. N. 244, 8 Brit. Col. L. R. 393, affirmed. *Fawcett v. Canadian Pacific R. W. Co.*, 32 S. C. R. 721.

**10. Employers' Liability Act, Nova Scotia—Railway—Defect in way**—*Voluntary incurring of risk—Contributory negligence—Damages—Costs.*—The plaintiff was employed as a brakeman on cars that were being loaded with stone from a chute on the defendant company's line of railway. At a distance of 150 to 200 feet from the chute where the cars were loaded was a second and unused chute which the cars were required to pass in order to reach the loading point. The track sloped from the point where the empty cars were stationed to the point where they were filled, and as soon as one car was filled it was the duty of the brakeman to release the brakes and allow another car to run down the track and take its place. The gear controlling the brake of a car which the plaintiff was placing in position to be filled failed to work properly, and the plaintiff was obliged to descend for the purpose of releasing it. As he was attempting to regain his position, after the car had started, in order to be in a position to control it, he was caught between the car and one of the posts supporting the unused chute, and was injured.—The attention of the manager of the defendant company had previously been called by the plaintiff to the danger of accidents from this cause, and he had promised to have it remedied, but nothing was done till after the accident, when the chute was removed.—The plaintiff had been employed by the company for two years prior to the happening of the accident, but had only been engaged in this particular work for some nine days:—*Held*, that the position of the post, coupled with the position from which the empty cars had to be started, constituted a defect, and should have been remedied when the attention of the defendants' manager was called to the danger arising from it.—After the plaintiff had notified the manager of the danger, there was nothing in his continuance in the defendants' employ from which to infer that he voluntarily incurred the risk.—Notwithstanding evidence that the plaintiff might have got on the car in another way, and thus have avoided the accident, he was, under the circumstances, only called upon to use a reasonable way of doing what he

was called upon to do—not the safest way—and that the finding of the jury that the plaintiff was not guilty of contributory negligence should not be disturbed.—In the absence of evidence of permanent injury, the damages assessed (\$850) were excessive and should be reduced; no costs to either party. *Day v. Dominion Iron and Steel Co.*, 36 N. S. Repts. 113.

**11. Evidence—Death from electrical shock—Inference as to cause of death—Jury—Negligence—New trial.**—The plaintiff's son and another labourer were directed to clear up and remove the rubbish caused by their cutting a trench in the concrete floor of an alleyway in the defendants' power house. The alleyway was crossed at right angles by others, on each side of which were electric machines and live wires within arm's length of any one working in the trench, one of the latter of which was ruptured, perhaps by bending in constant use. The other labourer went into a cross alleyway where the live wires were, although there had been a slat nailed across it when the two were put to work; and was sweeping towards the trench the litter that had been scattered about, when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switchboard, plaintiff's son being dead. It was shewn that there was a rupture in the insulation of a loose loop or cable hanging from the switchboard directly over where the survivor was lying, and that the insulation of the wires was, with respect to the voltage passing, insufficient for the safety of anyone working among them, and that the hanging loop might easily have been better guarded than it was:—*Held*, that there was evidence which could not be properly withdrawn from the jury, and a nonsuit was set aside, and a new trial ordered. *Griffiths v. Hamilton Electric and Cataract Power Co.*, 23 Occ. N. 293, 6 O. L. R. 296.

**12. Factories Act, Ontario—Negligence—Unguarded machinery—Proximate cause.**—The plaintiff, a workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step-ladder to get on a plank in front of the drier. The step-ladder was movable and placed close to a revolving cog-wheel. On returning from the drier on one occasion, another workman, accidentally or intentionally, removed the ladder as the plaintiff was about to step on it, and before he could recover his balance his leg was caught in the cog-wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found

that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded, and the ladder fastened to the floor; and that the non-guarding and fastening was negligence of the defendants:—*Held*, affirming the judgment of the Court of Appeal, 3 O. L. R. 600, 22 Occ. N. 203, that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor, for which the defendants were liable. *Myers v. Sault Ste. Marie Pulp Co.*, 23 Occ. N. 81, 33 S. C. R. 23.

**13. Negligence—Death—Action by widow—Employment of competent persons—Damages—Pecuniary loss—Benefit of heirship.**—The plaintiff's husband was suffocated by a fire which broke out suddenly in the defendants' distributing station. The evidence, in the opinion of the Court, justified the conclusion that if competent persons had been in charge of the work proceeding when the fire broke out, it might have been extinguished in time to prevent any injury to the deceased:—*Held*, that it is the duty of the employer to have competent persons in charge while work of a dangerous character is being performed, and he is responsible for an injury to a workman which might have been prevented if the persons in charge had been sufficiently on the alert to give timely warning. The fact that the deceased might have adopted a safer and more prudent method of attempting to escape from the danger did not relieve the employer from responsibility.—2. The "damage occasioned by the death" of the person injured, under Art. 1056, C. C., is limited to pecuniary loss, and where the widow, claimant under that Article, is heir to the deceased, the pecuniary benefit accruing to her as such heir must be deducted from the loss occasioned by the death.—3. It is for the defendant, in such action, to establish to what extent the claimant, as heir, has benefited by the death, after liquidation of the liabilities of the estate. The Court may, however, under Art. 371, C. C. F., in the absence of such proof, order the plaintiff to appear and answer on oath, in order to complete the proof necessary for the determination of the amount for which judgment should be rendered. *Warboys v. Lachine Rapids Hydraulic and Land Co.*, Q. R. 22-S. C. 531.

**14. Negligence—Unskilled workman—Dangerous work—Reasonable precautions.**—Although an employer is not

liable, as a general rule, for the result of accidents which happen to employees from dangers essentially inherent in the work which is being performed, he nevertheless becomes liable when reasonable precautions have not been taken by him to reduce the danger to the lowest point or remove it altogether. And so, when work which is not specially unsafe for a skilled workman, such as the driving of spikes on a railway, is intrusted to an unskilled person, the employer is responsible for an accident to the workman resulting from his inexperience, reasonable precautions to avoid it not having been adopted. *Sparano v. Canadian Pacific R. W. Co.*, Q. R. 22 S. C. 292.

**15. Workmen's Compensation Act, Ontario—Disobedience to orders—Railway—Death of engine-driver—Negligence—Contributory negligence—Signals.**—The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shewn to indicate how it was set, by lowering the upper or lower arm of the signal as the case might be. The plaintiff's husband, an experienced engine-driver in the defendants' employment, having been informed before starting with his train that the apparatus was in working order, and that all trains were to be governed by the rules applicable in such cases, approaching the spot saw the signal with both arms down, intimating that the interlocker was out of order, but nevertheless proceeded, and the switch not being fastened in any way, the train was derailed and he was killed. As a matter of fact, the apparatus was not in working order, a switchman of the defendants' being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendants' rules governing engine-drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case of doubt they were to take the safe course and run no risk. Employees were also specially instructed that if an interlocker was out of order trains were to be flagged through. The plaintiff brought this action for damages under R. S. O. 1897 c. 166:—*Held*, that, although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, the plaintiff was properly nonsuited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules, by proceeding in spite of the signals. *Holden v. Grand Trunk R. W. Co.*, 23 Occ. N. 104, 5 O. L. R. 301.

## III. OTHER CASES.

**1. Liability of master for negligence of servant—Injury to third person—Want of skill.]**—The defendants were engaged by M. T. & Co. to remove furniture from one place to another. It became necessary to lower some tables from an upper window, and the plaintiff, who was not in the employment of the defendants, but was employed by M. T. & Co., was directed to stand below and, by the use of a long board, keep the tables clear of the windows below. While he was so engaged a table, which was badly tied by defendants' men, fell down and the plaintiff's legs were fractured:—*Held*, that as the defendants alone had charge of the removal, so far as the actual performance and mode of operation were concerned, responsibility for their employee's want of skill in not properly securing the table, attached to the defendants, and they were, therefore, liable for the result of the accident. *Williams v. Cunningham*, Q. R. 23 S. C. 263.

**2. Medical attendance on servant—Liability of master—Contract—"Hospital fund."]**—A fund called "the hospital fund" was held by a mining company for the purpose of providing medicine and medical attendance for those of the men who required it, medical men being attached to the works, whose duty it was to attend the men and provide the necessary medicines:—*Held*, that no obligation was imposed on the company to pay out of this fund for the services of any physician whom the men might choose to employ. *Struthers v. Canadian Copper Co.*, 23 Occ. N. 323, 6 O. L. R. 374.

**3. Servant leaving employment—Action—Damages—Particulars.]**—In an action for damages against an employee for deserting his employment, it is sufficient to allege in relation to damages that he left his employment at a time when several of the employees were absent upon holidays. *Chaput v. Charland*, 6 Q. P. R. 33.

**4. Servant leaving employment without notice—Quantum meruit—Cross-demand for damages.]**—The plaintiff was engaged by the defendants at a monthly salary. After working for 19 days in a certain month, he left without giving any notice, and subsequently brought this action for \$20 for 19 days' work actually performed. The defendant company brought a cross-action for damages resulting from the plaintiff leaving their employment without notice:—*Held*, that by leaving without notice, the plaintiff had forfeited his right to wages

even for work done.—2. That upon the proof adduced the defendants had made out their case on a cross-demand. *McKee v. Canadian Pacific R. W. Co.*, 23 Occ. N. 121.

**5. Wages—Engagement by the day—Dismissal at midday.]**—The defendant had engaged the plaintiff and several other workmen by the day at \$2 a day, and they had done masonry work for him from the commencement of July until midday on Saturday the 15th August, when the defendant dismissed them, telling them that he had not space and stone to keep them busy for the rest of the day. The defendant acted thus because, as he said, the number of masons engaged was too great for the work to be done that afternoon. When he dismissed them at midday he only paid them up to midday. They remained at the place at the defendant's disposition, and the defendant did not pay them until 5 o'clock in the afternoon, and then refused to pay them their wages for the afternoon. They sued him for the wages for the afternoon:—*Held*, that they had the right to wages for the half day, because the defendant should have foreseen the shortness in the material and should not have engaged for the whole day more workmen than he had need of. *Corriveau v. Larose*, Q. R. 24 S. C. 44.

## MASTER IN CHAMBERS.

See COURTS, VI.

## MASTER IN ORDINARY.

See REFEREES AND REFERENCES, 3.

## MAYOR.

See MUNICIPAL CORPORATIONS, X.

## MECHANICS' LIENS.

**1. Action—Affidavit verifying statement of claim—Particulars of residence.]**—In the case of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, the affidavit verifying the statement of claim, required by s. 31 (2), may be made by the plaintiffs' solicitor as agent.—The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganized

district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor was also stated therein:—*Held*, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs. *Oreror v. Canadian Pacific R. W. Co.*, 23 Occ. N. 171, 5 O. L. R. 383.

**2. Builder's privilege—Contract with owner—Right to lien—“Additional value.”**—A contractor who contracts directly with the proprietor of a building which is being constructed, is entitled to register a privilege under the terms of Art. 2013, C. C., as amended by 59 V. c. 42 (Q.).—2. The “additional value,” referred to in the Article, is the additional value given to the immovable by the work at the time it is done. *Galerneau v. Tremblay*, Q. R. 22 S. C. 143.

**3. Costs—“Actual disbursements.”**—The “actual disbursements” which, by s. 42 of the Mechanics' Lien Act, R. S. O. 1897 c. 153, may be allowed as against an unsuccessful claimant, in addition to an amount equal to twenty-five per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and *a fortiori* not counsel fees charged by the solicitor himself when acting as counsel. *Cobban Manufacturing Co. v. Lake Simcoe Hotel Co.*, 23 Occ. N. 168, 5 O. L. R. 447.

See COMPANY, III. 6.

## MEDICAL PRACTITIONER.

See MASTER AND SERVANT, III. 2—  
MUNICIPAL CORPORATIONS, XIII. 2  
—PLEADING, II. 1.

## MERCANTILE AGENCY.

See DEFAMATION, I. 8, 9.

## MILEAGE.

See SHERIFF, 2.

## MILITARY LAW.

**Militia—Right to give orders—Militia Act—Arrest—Liability.**—Men who belong to the regular army are subject

both to the law and to military regulations, and they are obliged to obey the orders which their superiors give them, if such orders relate to military affairs, and are not so obviously unlawful as to shew that the person giving them is suffering from some sort of mental aberration.—2. It is otherwise with those who belong to the militia; they are not subject to the law and to military regulations and obliged to obey their superiors except in the cases expressly mentioned in the Militia Act. In other respects they are only ordinary citizens, and their superiors have no right to give them orders any more than they have to give orders to those who do not belong to the militia.—3. An officer of militia who illegally places under arrest a person belonging to the militia, makes himself responsible in damages to the latter. *Cooke v. Cole*, Q. R. 22 S. C. 25.

See ASSESSMENT AND TAXES, IV. 2.

## MINES AND MINERALS.

**1. Action—Inspection—Underground workings—Plans—Privilege—Enforcement of order.**—The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings.—*Per MARTIN, J.*—(1) The practice respecting inspection under r. 514 is distinct from the practice in obtaining discovery, and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive. (2) It is a proper and convenient practice to apply to the Court to enforce an order for inspection when the resistance is not contumacious. *Star Mining and Milling Co. v. Byron N. White Co.*, 9 Brit. Col. L. R. 422.

**2. Adverse claim—Form of plan and affidavit—Right of action—Condition precedent—Necessity for actual survey—Blank in jurat.**—The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the Mineral Act of British Columbia, as amended by s. 9 of the Mineral Act Amendment Act, 1898, need not be based on an actual survey of the location made by the provincial land surveyor who signs the plan.—The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action.—The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn:—*Held*, that the absence

of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by the British Columbia Oaths Act, and the British Columbia Supreme Court Rule 415 of 1890. Judgment in 9 Brit. Col. L. R. 184 reversed. *Paulson v. Beaman*, 23 Occ. N. 60, 32 S. C. R. 655.

**3. Extralateral rights—Trial—Adjournment of—Mineral Act, 1891, s. 31.]**—Appeal from an order on an application to postpone trial, fixing a date (peremptory) for trial of an action by the owners of a mineral claim for an injunction restraining the defendants, who were the owners of adjoining mineral claims, from running a tunnel from their claims on to the plaintiff's ground. The defendants claimed, under s. 31 of the Mineral Act of 1891, the right to follow on to the plaintiff's ground the vein of ore in question, because the apex of the said vein was on the surface of their claim. Before going to trial the defendants wished to do development work in order that they might determine definitely the continuity of the vein in question, and they shewed that it was impossible for them to do the work needed by the date fixed for the trial:—*Held*, allowing the appeal, that the defendants should not be forced on to trial without being given a fair opportunity of doing such development work as might be necessary to determine the position of the apex of the vein in question. *Noble Five Mining Co. v. Last Chance Mining Co.*, 23 Occ. N. 252, 9 Brit. Col. L. R. 514.

**4. Free-miner's certificate — Revocable—Vesting of interest in co-owners — Sheriff—Levy under execution.]**—The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free-miner, and, before sale under execution, the debtor allowed his free-miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of s. 4 of the Mineral Act Amendment Act, 1899, and it was contended that the debtor's interest had thus been revived and re-vested in him subject to the execution:—*Held*, that upon the lapse of the free-miner's certificate the interest in question had, under the statute, become absolutely vested in the co-owner, and could not thereafter be revived and re-vested in the debtor by the issue of a special certificate. Judgment in 22 Occ. N. 341, 9 Brit. Col. L. R. 131, affirmed. *Van Norman Co. v. McNaught*, 23 Occ. N. 63, 32 S. C. R. 690.

**5. License — Rights acquired under application—Estoppel — Amendment.]**—

The respondents made application at the office of the Commissioner of Mines for a license to search for coal areas. The application contained a good description of the property in respect of which the license was desired, and was accompanied by the necessary fee.—Subsequently one of the applicants received a letter from the Deputy Commissioner, stating that he could not find the starting point, and asking for additional information.—A letter was sent in reply, in which the starting point was stated incorrectly, and at a different point from that mentioned in the original application:—*Held*, affirming the decision of the Commissioner of Mines, that, there having been a certain description, and the money and application having been appropriated, the license could not be removed to another locality.—The applicants were not estopped, and could not be bound, by an entry made in the registry book of the office, after the receipt of the letter sent in reply to the letter of the Deputy Commissioner, and they could not, as the result of such entry, lose the title that they had acquired by a good application.—*Seemle*, that applications may, subject to the rights of intervening applicants, be amended for such causes as uncertainty, but not where there is a certain description and location of the area applied for. *In re Barrington*, 35 N. S. Reps. 426.

**6. Mining lease—Boundaries of area —Starting point—Evidence—Plan.]**—In an action brought by the plaintiff to recover damages for the mining and removal of iron ore, claimed by him, under a lease from the Crown, judgment was given in favour of the defendant company, on the ground that, in order to recover, it was necessary for the plaintiff to establish the south line of land originally granted to G.—The starting point in the plaintiff's lease was a marked stone, located a given distance from a marked maple tree, "on the south line of lands originally granted," etc.:—*Held*, following *Fielding v. Mott*, 6 R. & G. 330, 14 S. O. R. 254, that the trial Judge erred in holding that the plaintiff could not recover unless he established the south line of the land granted to G., as such line, if shewn to be in a different place from the marked tree, would be rejected as *falsa demonstratio*.—A copy of a plan from the Crown lands office, as to which one of the plaintiff's witnesses was cross-examined, and which was put in by the defendants' counsel, without restriction, as part of his general evidence, was in for all purposes to which the plaintiff might apply it, and was properly used for the purpose of proving measurements made on the ground. *Bartlett v. Nova Scotia Steel Co.*, 35 N. S. Reps. 376.



**7. Overlapping claim—Renewal of application—Re-staking.]**—In August, 1889, M. staked and received a grant for a placer claim, which included part of an existing creek claim, staked previously by W. In 1900 M. applied for and obtained a renewal of his license, embracing the identical ground staked by him in the previous year, and, at the time such renewal was applied for, W.'s creek claim had lapsed. In March, 1901, S. staked a bench claim, embracing the lands in W.'s expired location, which had been overlapped by M.'s claim, as being unoccupied Crown land:—*Held*, that, although M.'s original staking of the ground in dispute was invalid, yet, as W.'s claim had lapsed at the time of the application for a renewal grant in 1900, M. having been continuously in possession of the whole location as staked by him, his stakes still standing and the limits of his area well known, his application for the renewal gave him a valid entry without the formalities of re-staking and applying anew for the original area located by him, and, following the rule laid down in *Osoorne v. Morgan*, 13 App. Cas. 227, S. could not interfere with M.'s possession. *St. Laurent v. Mercier*, 23 Occ. N. 211, 33 S. C. R. 314.

**8. Royalties — Dominion Lands Act — Publication of regulations — Renewal of license — Voluntary payment.]**—The Dominion Government, by regulations made under the Dominion Lands Act, may validly reserve a royalty on gold produced by placer mining in the Yukon, though the miner, by his license, has the "exclusive right" to all the gold mines — that is, exclusive only against quartz or hydraulic licenses or owners of surface rights, and not against the Crown. The provision in s. 91 of the Dominion Lands Act as to publication of regulations, means that the regulations do not come into force on publication in the last of four successive weeks in the *Gazette*, but only on the expiration of one week therefrom.—Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.—One of the regulations of 1889 was, that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year:—*Held*, reversing the judgment in 7 Ex. C. R. 414, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he was subject to the terms of any regulations made since such grant was issued.—The new entry cannot be made and

new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.—Regulations in force when a license issued, were shortly afterwards cancelled by new regulations imposing a smaller royalty:—*Held*, that the new regulations were substituted for the others and applied to said license. *Rea v. Chappelle*, *Rea v. Carmack*, *Rea v. Tweed*, 23 Occ. N. 34, 32 S. C. R. 586. Leave to appeal granted by the Judicial Committee, 23 Occ. N. 163.

**9. Staking claims — Annulment of prior lease—Volunteer plaintiff—Right of action—Status of adverse claimants.]**—In an action by free-miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect:—*Held*, that, where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" claims on the lands included within the leased limits did not give them any right or interest in the lands, nor did they thereby acquire such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease. *Hartley v. Matson*, 23 Occ. N. 61, 32 S. C. R. 144.

See APPEAL, X. 11—FRAUD AND MISREPRESENTATION—MASTER AND SERVANT, II. 6, 7—PARTIES, 4—PRINCIPAL AND AGENT, 10—PRIVY COUNCIL, 1—RAILWAY, VII. 5—SCHOOLS, 4—VENDOR AND PURCHASER, 8.

## MISDIRECTION.

See CRIMINAL LAW, II. 6, 14—DEFAMATION, I. 9—MALICIOUS PROSECUTION, 2—TIMBER.

## MISE EN DEMEURE.

See COSTS, I. 4.

## MISTAKE.

Recovery of money paid under mistake of fact — Mortgage—Account — Acknowledgment — Estoppel — Appeal

—*Cross-appeal—Leave—Parties—Costs.*]

—The judgment of ROBERTSON, J., 22 Occ. N. 59, was reversed on appeal:—*Held*, that there could be no recovery against the executors, because their testator was not the person who received the erroneous overpayments sought to be recovered back. He omitted to give credit in his books or on the plaintiff's mortgage for two sums paid to him, but the plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors subsequently assigned the mortgage to the defendant G. W. L. H. in part satisfaction of the legacy bequeathed to him by their testator, there was still a considerable balance due thereon. The time when these payments should have been taken into consideration was when the mortgage was being paid off to G. W. L. H. There was nothing to create an estoppel as between him and the plaintiff so as to have prevented the latter from then claiming credit for these payments. G. W. L. H., and not the testator, was the person who received too much, and it was the payment to him which was erroneous. —The executors, upon their appeal from the judgment against them, were entitled to be relieved and to costs of the action. And the plaintiff, although he had omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. H., should be permitted to do so, *nunc pro tunc*, and judgment should be entered for the plaintiff against G. W. L. H. with costs down to the trial and settlement of the judgment as if G. W. L. H. had been the original and only defendant. No costs of the appeal to any of the parties. *McDermott v. Hickling*, 23 Occ. N. 40.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 8, 13—CONTRACTS, VIII, 4—JUDGMENT, II, 8, IV, 4—MALICIOUS PROSECUTION, 2—REVENUE, 2—SUBROGATION—WAY, I, 2—WILL, I, 3.

## MORTGAGE.

**1. Building society — Action on covenants after foreclosure—Reopening—Consolidation — Lien — Purchaser for value — Adding parties.]** — On the 27th December, 1893, the defendant K. gave a mortgage to a loan company to secure \$400. On the 10th March, 1894, K. agreed to sell the mortgaged property to L., and L. paid the purchase price. On the 4th June, 1895, the defendant K. gave a mortgage to the same company on other property to secure \$2,600. K. subscribed on each occasion for shares in the loan company, which he assigned to the com-

pany as security for the loans, the mortgages being treated as collateral. Each mortgage contained a proviso that the company should have a lien upon all stock then or thereafter held by the defendant as security for the loans. K. allowed the payments on both mortgages to fall into arrear. The company proceeded on the \$2,600 mortgage, and on the 24th August, 1899, obtained an order vesting the title to the property covered by it in themselves and debarring K. from all right to redeem. The plaintiff company became the owner of the two mortgages by assignment, and on the 10th January, 1901, sued K. upon his covenant for payment in the \$2,600 mortgage, offering to reopen the foreclosure, and claimed the right to consolidate the two mortgages:—*Held*, that L. was entitled to be added as a party defendant under s. 36 of the Judicature Ordinance, 1898, and that the plaintiffs had no right to consolidate as against him.—2. The proceedings upon the \$2,600 mortgage were not identical with foreclosure proceedings, and the presumption from the company's taking a vesting order and from their delay in suing was that they intended to take the land in full satisfaction and to abandon the remedy on the covenant. *Colonial Investment and Loan Co. v. King*, 23 Occ. N. 126, 5 Terr. L. R. 371.

**2. Costs — Excessive demand — Tender.]** — Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due. *Daigneau v. Dagenais*, 23 Occ. N. 90, 5 O. L. R. 265.

**3. Sale under power — Fraudulent scheme—Subsequent purchase for value —Exchange of lands — Constructive notice—Redemption—Costs.]**—A mortgagee of land made a colourable sale of the land, under the pretended exercise of the power of sale, to D., who conveyed to the mortgagee's wife, who conveyed to B., receiving in exchange a conveyance of another lot. The solicitor who acted for the mortgagee in the sale proceedings and drew the conveyances to D. and the mortgagee's wife, also acted for B. in drawing the deed of the lot conveyed by her in exchange, but there was nothing to shew that he had been instructed to examine the title of the mortgaged land on behalf of B.:—*Held*, that B. was not affected with notice of anything the solicitor knew, but that knowledge of the contents of the conveyances and of other facts from which a court of equity would infer

that there had not been an actual *bond fide* exercise of the power, should be imputed to B., whose husband acted as her agent and was aware of the facts, and thus she had sufficient notice of the plaintiff's right as owner of the equity to prevent her from claiming the property free from it. *Rose v. Peterkin*, 13 S. C. R. 677, followed.—2. The conveyances to D. and the mortgagee's wife operated to vest the legal estate in the latter, and she could exercise the power of sale, which had not been exhausted. *Henderson v. Astwood*, [1894] A. C. 150, followed.—3. The conveyance to B. (being only a quit claim deed) could not be treated as an exercise of the power of sale because it did not purport to grant the whole estate in mortgage, but only the interest of the grantor, which was really only that of a mortgagee.—4. The power of sale cannot be properly exercised by the mortgagee accepting other property in exchange, unless there is no value in the equity. *Smith v. Spears*, 22 O. R. 286, explained and distinguished.—5. B. was entitled, on being redeemed, to add to her claim the costs of the sale proceedings up to but not including nor beyond the conveyance to D., and (following *Harvey v. Tebbutt*, 1 J. & W. 197) the costs of the action so far as it was for redemption only, but she should pay the plaintiff the costs occasioned to him by her resisting the claim to redeem, to be set off; and the mortgagee should pay the costs of the plaintiff and of B. *Winters v. McKinistry*, 22 Occ. N. 213, 23 Occ. N. 54, 14 Man. L. R. 294.

**4. Sale under power—Short Forms Act—Sale without notice.**—The insertion of the word "calendar" before the word "month" in the words given in column one, number 13, of the second schedule to the Short Forms Act, R. S. M. 1902 c. 157, does not prevent the mortgagee getting the benefit of the wording of the corresponding long form; and, where the words of the short form above referred to were followed by the words "Should default be made for two months a sale or lease may be made hereunder without notice:"—*Held*, that these words were effectual to enable the mortgagee to make a valid sale and conveyance of the whole estate mortgaged, without giving any notice whatever of his intention to do so. *In re Cotter*, 23 Occ. N. 289, 14 Man. L. R. 485.

See BUILDING SOCIETY—COMPANY, I. 4—CONSTITUTIONAL LAW, 8—COSTS, VII. 10—COURTS, IV.—DEED, 2—DOWER, 4—EXECUTION, I. 1—EXECUTORS AND ADMINISTRATORS, 7—FIXTURES, 2—FRAUDULENT CONVEYANCE, 4—INFANT, 6—INSURANCE, II. 5—INTEREST, 3—LIMITA-

TION OF ACTIONS, II. 3—MISTAKE—PRINCIPAL AND SURETY, 3—RAILWAY, I. 1—TRUSTS AND TRUSTEES, 3.

## MORTMAIN.

See CHURCH, 2—WILL, II. 4, 6, 8.

## MUNICIPAL CORPORATIONS.

- I. BY-LAWS.
- II. CABS.
- III. CONTRACTS.
- IV. COUNCILLORS.
- V. DEBENTURES.
- VI. DITCHES.
- VII. DRAINAGE.
- VIII. EXPENDITURE.
- IX. HIGHWAYS.
- X. MAYOR.
- XI. NUISANCE.
- XII. POLICE OFFICERS.
- XIII. PUBLIC HEALTH.
- XIV. PUBLIC LIBRARIES.
- XV. TRANSIENT TRADERS AND HAWKERS.
- XVI. OTHER CASES.

See APPEAL, VIII. 2—ASSESSMENT AND TAXES—COMPANY, IV. 4, 5—CONSTITUTIONAL LAW, 12—CONTRACT, II. 1, VI. 1—COSTS, VII. 1—LIQUOR LICENSE ACT—NUISANCE, 2—PAUPER—RAILWAY, V. 1, VII. 2, 3—STREET RAILWAYS, 1—WATER AND WATERCOURSES, 7—WAY.

### I. BY-LAWS.

**1. Dog tax — Summary conviction — Amendment — Duplicit — Special Act—Application of general Act.**—Amendment of clerical errors is permissible after proof, in summary matters.—2. Allegation of violation of two clauses of a by-law is not a cause for the dismissal of a complaint. — 3. The Town Corporations Act clauses are not applicable against the special authorization of a city charter.—4. The head of a household, inscribed as a voter on the valuation roll, is liable for the dog tax. *Bell v. Parent*, Q. R. 23 S. C. 235.

**2. Early closing of shops — Ultra vires—Penalty—Imprisonment — Special charter—Private rights.**—It is ultra vires of a municipal corporation to pass a by-law ordering the early closing of

shops, and imposing, for an infraction thereof, a penalty with the alternative of imprisonment, under the sole authority of 57 V. c. 50, when there is no specific provision in its charter to pass such a by-law.—2. When a municipality is acting under a special charter the provisions of the Municipal Code do not apply.—3. A by-law containing a penal clause, with alternative of imprisonment, must be directly and specifically authorized by the Legislature. — 4. *Seem*, that a by-law ordering the closing of all shops at a certain hour is tyrannical, oppressive, arbitrary, not in the general interest of the public, and an unwarrantable and unjust interference with private rights. *Town of Coaticook v. Lothrop*, Q. R. 22 S. C. 225.

**3. Houses** — [Construction of — Conviction — *Certiorari*.] — A municipal by-law may forbid the construction of houses of less than two storeys which are not cottages, and a conviction under such a by-law will not be quashed upon *certiorari*. *St. Pierre v. City of St. Henri*, 5 Q. P. R. 362.

**4. Local option** — [Application to quash — Alleged irregularities — Submission to electors.] — Application to quash a local option by-law of the rural municipality of Argyle, passed in 1889, under the Liquor License Act, 52 V. c. 15.—Three objections were taken: (1) that the by-law was not signed by the reeve; (2) that the by-law fixing the day, hour, and places for taking the vote was not signed by the reeve, or sealed with the corporate seal; and (3) that the notice of the by-law and of the purpose to take the vote thereon was not published during the period in which it was required to be published.—By s. 428 of the Municipal Act, R. S. M. 1902 c. 116, an application to quash a by-law cannot be entertained unless the application is made within one year from the passing of the by-law, "except in the case of a by-law requiring the assent of the electors or ratepayers, when the by-law has not been submitted to, or has not received the assent of, the electors or ratepayers." A similar provision, differing only as to the period of limitation, was in force when the by-law in question was enacted; see 49 V. c. 52, s. 328:—*Held*, that the above provision meant a submission in fact, and an assent in fact as ascertained by a submission in fact, without reference to the validity of the formalities attending the submission.—The alleged by-law was submitted to a vote of the electors and received their assent, and it had stood without objection for over thirteen years.—The summary method of quashing a by-law was the creature of the statute, and

must be taken with the limitations imposed by the statute. *In re Houghton and Rural Municipality of Argyle*, 23 Occ. N. 237.

**5. Penalty** — [Recovery by corporation — Exemption — Pleading.] — A suit for the recovery under a by-law of a penalty, belonging wholly to the corporation, is properly brought in the name of the corporation. And the plaintiff corporation are not obliged to put defendant *en demeure* to shew that he is exempt under a special clause of the by-law. *Township of Cleveland v. Ledoux*, Q. R. 22 S. C. 85.

**6. Purchase of waterworks** — [Special tax — Submission to ratepayers — Debentures — Attacking by-law — Parties — Ratepayer — Corporation.] — A by-law of a municipal council for the purchase of an aqueduct and a system of sewers should contain a clause imposing a special tax and be submitted to the vote of the ratepayers.—2. Such a by-law containing only a clause for the issue of debentures, not providing for the imposition of a special tax, and not submitted to the ratepayers, is void.—3. The nullity of such a by-law extends not only to the part which provides for the issue of debentures, but also to the other parts which provide for the purchase of the aqueduct and the system of sewers; the by-law is, therefore, void *in toto* as well as the contract of purchase which it authorizes.—4. Such by-law may be attacked by any ratepayer of the municipality.—5. *Seem*, that the corporation cannot itself take proceedings in its own name to have the nullity of the by-law declared. *Gagnon v. Village of Pointe-au-Pic*, Q. R. 22 S. C. 396.

**7. Violation** — [Toleration by corporation — Liability for damages.] — A city corporation has no right, in the administration of its by-laws, to act with partiality, and where it tolerates the violation of an existing by-law, it is responsible for the damages thereby caused. *Brunet v. City of Montreal*, Q. R. 23 S. C. 262.

See post II. 1, III. 1, V. 1, 2, IX., X. 2, XI. 1, XIV. 1, XV., XVI. 7, 8.

See, also, APPEAL, VI. 1—CONSTITUTIONAL LAW, 3—LIQUOR LICENSE ACT. I.—MALICIOUS PROSECUTION, 4—NUISANCE, 2—PLEADING, VII. 5—PUBLIC HEALTH, 2—SCHOOLS, 2.

## II. CABS.

**1. By-law** — [Cab-rank — Private grounds.] — The corporation of the city

of Montreal cannot by by-law prevent a licensed cabman from taking up his station upon the private property of a hotel proprietor, with the consent of the latter. *Desmarais v. Samson*, 5 Q. P. R. 167.

**2. License — Chief constable — Discretion — Mandamus.]**—The chief of police of the city of Montreal has a discretion to exercise in the granting of permits or licenses to cabmen, and the Court will not by mandamus interfere with the exercise of this discretion, unless the chief of police has acted in bad faith and with evident injustice.—2. The fact that the chief of police has granted a permit to a cabman, after the latter has committed reprehensible acts, is not a ground for granting a permit to him for the following year, if the chief of police is satisfied that he should not have granted the first one. *Carrière v. Legault*, Q. R. 23 S. C. 449.

**3. License—Mandamus.]**—A cabman who alleges that his license has been taken away from him illegally, cannot obtain a mandamus against the municipal corporation by which the license was granted, to compel the return of it. *LaBerge v. City of Montreal*, Q. R. 22 S. C. 473.

**4. Regulation of cabmen—Establishment of stand — Committee of council — Resolution — Action.]**—The council of the city of Montreal has no power to delegate to a committee the authority, vested in it by the charter of the city, to prescribe standing places or stations for cabs.—2. The resolution of a committee of the council cannot be considered a by-law so as to bring it within the provisions of s. 304 of the charter of the city, 62 V. c. 58 (Q.), concerning the annulment of by-laws, on petition of any ratepayer, on the ground of illegality.—3. A licensed cabman has, as such, no special or individual interest sufficient to justify an action for the annulment of a resolution of a committee of the city council establishing a cabstand.—Judgment in Q. R. 23 S. C. 256 reversed. *Samson v. City of Montreal*, Q. R. 23 S. C. 500.

### III. CONTRACTS.

**1. Agent — Designation of principal — Change of principal — By-law — Approval of ratepayers — Bonus — Mandamus — Specific performance.]**—Where a principal has been named by the agent charged with the negotiation, the latter cannot afterwards designate a different person as his principal, and more particularly where the negotiation would not

have been entered into if the principal secondly designated had been disclosed at the outset.—2. Where a contract with a municipal corporation required the sanction of a by-law approved by the ratepayers, and a by-law substantially embodying the terms of the contract, with the name of the principal first designated, was rejected by the ratepayers, the corporation were held not subject to any further liability.—3. The contract in question, although disguised as a sale with a consideration of one dollar, really amounted to a bonus, and in manner and form, as made, was *ultra vires* of the corporation.—[The question whether there was a right to a mandamus to enforce specific performance of a contract, under the circumstances, was not decided.] *Real Estate Investment Co. v. Town of Richmond*, Q. R. 23 S. C. 151.

**2. Breach — Damages — Construction of sewers — Interference by reason of other city sewers.]**—The plaintiff entered into a contract with the corporation of the city of Ottawa to construct certain sewers. In the course of his work the contents of certain city sewers, which existed in the streets in which the plaintiff was required to build the sewers he had contracted to construct, the existence of which was not known to and was not disclosed to him, flowed into the trenches dug by him and impeded and delayed him in the work and caused him additional expense in doing it:—*Held*, that the plaintiff was entitled to recover damages from the defendants for the loss he had thus sustained, for the defendants owed him a duty to do nothing to prevent or interfere with his doing the work he had contracted to do, and in discharging through the sewers under their control upon his work the sewage and other matter which they carried, they committed a breach of duty for which they were answerable to him in damages. *Bourque v. City of Ottawa*, 23 Occ. N. 263, & O. L. R. 287.

See post IV. 1, X. 1, XIV. 2.

### IV. COUNCILLORS.

**1. Disqualification — Insurance agent — Interest in contract.]**—A municipal councillor who represents an insurance company, and is paid by a commission on the premiums, is not disqualified from holding office by the fact that the company he represents insures through him property belonging to the corporation. Art. 4215, R. S. Q., which says that whosoever has, directly or indirectly, by himself or his partner, any contract or

"interest in any contract with the corporation," cannot be appointed a member of the council or act as such, does not cover the case of an agent paid by commissions on premiums paid under a contract between the insurance company and the corporation. *Pinder v. Evans*, Q. R. 23 S. C. 229.

**2. Illegal payments to — Recovery back.]**—A municipal corporation were held entitled to recover from councillors moneys illegally paid to them for services on a resolution of the council. *Town of Amherst v. Read*, *Town of Amherst v. Fillmore*, 23 Occ. N. 139.

**3. Pro-mayor of village — County council.]**—A pro-mayor of a local municipal council has no right to sit in the county council. *Paré v. County of Shetford*, Q. R. 24 S. C. 50.

See post XVI. 6.

See, also, MALICIOUS PROSECUTION, 4  
— MUNICIPAL ELECTIONS, 6, 7, 8, 10.

## V. DEBENTURES.

**1. By-law guaranteeing — Approval of ratepayers — Approval of Lieutenant-Governor.]**—Judgment in Q. R. 11 K. B. 77 affirmed. *Hanson v. Village of Grand'Mère*, 33 S. C. R. 50.

**2. Defective by-law — Remedial statute.]**—A municipal by-law was passed in 1892, on which debentures were issued, which provided for payment of the interest, but failed to provide for payment of the principal. The statute 3 Edw. VII. c. 18, s. 93 (O.), enacts that "where in the case of any by-law heretofore or hereafter passed, the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding."—*Held*, that the effect of this is to make one payment of interest validate the debenture in respect of which it is paid, and one payment of principal validate the debenture in respect to which it is paid; and that accordingly the debentures here in question fell within the scope of this remedial enactment. *Standard Life Assurance Co. v. Village of Tweed*, 23 Occ. N. 324, 6 O. L. R. 653.

See ante I. 6.

## VI. DITCHES.

**1. Construction of ditch without by-law — Trespass — Negligence — Costs.]**—Section 470 of the Municipal Act, R. S. O. 1897 c. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality."—In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—*Held*, that s. 470 did not apply, as the plaintiff's claim was for trespass, and not for negligence; and that the trial Judge had power over the costs; and the Court would not interfere with his discretion in awarding costs up to the trial to the plaintiff, while directing a reference as to damages.—Judgment of FERGUSON, J., 1 O. W. R. 559, affirmed. *Lawrence v. Town of Owen Sound*, 23 Occ. N. 138, 5 O. L. R. 369.

**2. Maintenance of ditch — Action against ratepayer — Prescription — Forum — Justices of the peace — Residence — Summons — Conviction.]**—The prescription of six months provided by Art. 2558, R. S. Q., does not apply to an action begun by a municipal corporation against a ratepayer, for the recovery of his share of the cost of maintenance of a line ditch.—2. Such a suit may be begun by the corporation after having paid the account of the rural inspector, but not before a justice of the peace, the right of recourse to that tribunal being a right personal to the rural inspector, which he cannot assign.—3. In this case, the summons calling upon the appellant to appear before two justices of the peace of the district of Montreal, without indicating their residence, and the conviction having been made by such justices without stating their residences, the summons and convictions were held void, the competence of justices of the peace under Art. 1042, M. C., depending upon their place of residence, which, therefore, must be mentioned. *Tourville v. Parish of St. François de Salles*, Q. R. 23 S. C. 67.

## VII. DRAINAGE.

**1. County road — Watercourse — Special superintendent — Procès-verbal.]**—Article 772 of the Municipal Code applies only to cases where it is necessary to dig a watercourse through lands fronting on a road duly established, and where such a watercourse is necessary not only for draining the water from the road, but also for draining the abutting lands.—2. In this case a watercourse serving the purpose of draining several

lots in the vicinity of a road was not in question, but only a prolongation or continuation of road ditches into natural watercourses to facilitate the flow of water from the road; and consequently the special superintendent had a right to provide in his *procès-verbal* for the digging and maintenance of these outlets by virtue of Arts. 799 and 803 of the Municipal Code. *County of Nicolet v. Tousignant*, Q. R. 12 K. B. 105.

**2. Execution of work by persons benefited — Default — Officers of corporation — Mandamus — Code of Procedure — Change in.]**—Municipal corporations have the direction and control of works necessary for the execution of *procès-verbaux* regulating the opening or maintenance of watercourses. — 2. If persons liable to do work, neglect to do it, the municipal corporation should have it done by their officers.—3. Municipal officers are subject to the orders of the municipal corporation, but not to the orders of private persons interested in the works, and they are responsible for their acts only to the corporation.—4. The Superior Court has the right to compel municipal corporations by mandamus to execute what they have ordered by their own *procès-verbaux*, and this right exists whenever there is no other remedy equally appropriate, advantageous, and efficacious.—5. The new Code of Procedure, so far from restricting the cases where mandamus may be obtained against corporations, renders the use of the writ applicable to a larger number of cases than the old Code of Procedure. See Art. 1022 of the old code, and Art. 992, No. 1. of the new. *Gauvin v. Parish of St. Patrice de la Rivière-du-Loup*, Q. R. 23 S. C. 318.

**3. Procès-verbal — Construction of drain — Private interest.]**—A municipal corporation has no power to order, by a *procès-verbal*, the construction of a watercourse begun in the interest of a private person and not in the interest of the public. *Fontaine v. Corporation of Sherrington*, Q. R. 23 S. C. 532.

**4. Qualification of petitioners — "Last revised assessment roll" — Costs of non-appealing party.]**—Judgment in 1 O. L. R. 156, 292, 21 Occ. N. 108, 201, affirmed. Appeal dismissed with costs to respondents the township of Lobo, but without costs to the respondent Oliver. *Challoner v. Township of Lobo*, 23 Occ. N. 35, 32 S. O. R. 505.

See DAMAGES, 3.

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## VIII. EXPENDITURE.

**1. Borrowing powers—"Ordinary expenditure"—School purposes—Costs.]**—The power conferred upon a municipality by the Municipal Act, R. S. O. 1897 c. 223, s. 435, of borrowing money to meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality, apart from the expenditure for school purposes.—Where this limit had been exceeded, but before the action was tried the money had been repaid, the plaintiff, who sued on behalf of himself and all other ratepayers, was held entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality. *Holmes v. Town of Goderich*, 23 Occ. N. 12, 5 O. L. R. 33.

**2. Credit legally voted—Expenses incurred — Payment — Treasurer — City charter.]**—What Art. 336 of the charter of the city of Montreal forbids to its council and its committees, and what Art. 338 punishes, is not the ordering of payment of expenses already incurred without their being covered by a credit legally voted, but the incurring of them without such a credit. The prohibition against paying these expenses is only directed to the treasurer of the city.—2. The restrictions provided by Arts. 336, 338, and 339 of the charter only apply to the expenses which the council has discretion to incur, and do not apply to disbursements which are provided for by statute or by a contract legally made by the council. *Stephens v. Préfontaine*, Q. R. 22 S. C. 11.

**3. Sanatorium — Proposed expenditure—Submission of question to electors — Injunction.]**—There is nothing in the Municipal Act permitting a municipal council to take a plebiscite, and there is no express prohibition against doing so.—Taking a vote of the electors upon questions or upon authorized by-laws is open to grave objections. And where a council sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, and, if favourable, to use the result as an argument in attempting to obtain for the

council legislative authority to make the grant, they were restrained by injunction from so doing. *Helm v. Town of Port Hope*, 22 Gr. 273, followed. *King v. City of Toronto*, 23 Occ. N. 92, 5 O. L. R. 163.

## IX. HIGHWAYS.

**1. Expropriation of land for highway** — *Procès-verbal* — *Ultra vires* — *Pleading*.] — Where an action is brought by a municipal corporation to compel the defendant to convey land for a road, the defendant cannot plead that the *procès-verbal* of the municipal inspector is void and *ultra vires*, and has been annulled by the Court; that the county council has not been consulted on the subject of the opening of the road; and that the defendant has sued the corporation for possession; such allegations will be struck out on demurrer. *Corporation of the Parish of Ste. Julie v. Malo*, 5 Q. P. R. 217.

**2. Extension of streets** — *Municipal works* — *Delay* — *Injury to individuals*.] — Municipal corporations, in deciding upon the extension of streets and municipal works generally into new districts, are acting judicially, and when so acting in good faith are not responsible for damages caused to individuals by delay in resolving upon such works, especially where such delay was occasioned by due regard to economy and prudent administration. *Rochon v. City of Montreal*, Q. R. 22 S. C. 42.

**3. Non-repair** — *Penalty* — *Informers* — *Action* — *Affidavit*.] — By virtue of Art. 1046, C. M., any adult person may in his private name claim the penalty imposed by Art. 793, C. M. — 2. The affidavit required by Art. 5716, R. S. Q., is not necessary in such a case. *Tourigny v. Corporation of St. Paul de Chester*, 5 Q. P. R. 199.

**4. Opening highway** — *Procès-verbal* — *Particulars of route* — *Persons affected* — *Right to attack* — *Municipal council* — *Homologation* — *Amendment* — *County or local road*.] — A *procès-verbal*, which provides for the opening of a road, satisfies the law if it sets out where the road is to be opened and that it is to have ditches and trenches everywhere necessary, even if it does not indicate precisely the places where they are to be made nor their width and depth. — 2. If the *procès-verbal* of a road states that it will pass through a place where a cheese factory stands, or any other place which it cannot pass through without the consent of the owner, or if it provides that fences shall be at the expense of persons who cannot be forced

to make them, such owner or such person illegally charged with the fences, may attack the *procès-verbal* upon that ground. — 3. In a *procès-verbal* numbers and dates may be indicated by figures. — 4. A municipal council called together to adopt a *procès-verbal* may amend it by adding particulars, the absence of which would have made it void. — 5. A road which extends through more than one municipality, is not a county road: it is only a local road of each one of the municipalities in which a part of it is situated. *Mondoux v. County of Yamaska*, Q. R. 22 S. C. 148.

**5. Opening highway** — *Procès-verbal* — *Petition to quash* — *Service* — *Time for presentation*.] — When a petition to quash a *procès-verbal* has been served within the thirty days following its adoption, it need not necessarily be presented to the Court at the next term. *St. Aubin v. Parish of St. Jerome*, 5 Q. P. R. 317.

**6. Opening highway** — *Report of superintendent* — *Notice* — *Parties interested* — *Adoption by council*.] — The report of a special superintendent upon the opening of a road will not be set aside, in spite of the want of a new special notice of the day upon which he is to visit the locality in question, if the interested parties are present, and submit to him all their grounds for or against the report. — 2. A *procès-verbal* adopted by the council will not be set aside because it is adopted at a general sitting of the council and without notice that it was to come up, if all the parties interested were present and stated their grounds for and against. *Paquet v. Township of Durham*, Q. R. 22 S. C. 233, 5 Q. P. R. 229.

**7. Petition for opening of road** — *Discretion of township council* — *Appeal to county council* — *Special meeting of council* — *Notice* — *Resolution* — *Minutes*.] — A township council has a discretionary power to grant or refuse a petition for the opening of a road, and however unjust its decision may appear, if the formalities required by law have been observed, the Superior Court will not interfere to set aside the decision; the remedy being by appeal to the county council. — 2. Notices of a special meeting of a municipal council orally given by the secretary-treasurer are sufficient. — 3. Resolutions of municipal councils are valid, although they are not entered in the minute book of the meetings of the council nor in the *procès-verbal* of the meeting at which they were adopted. *Martin v. Corporation of Windsor*, Q. R. 24 S. C. 40.

See ante VII. 1, post XVI. 7.



## X. MAYOR.

**1. Disqualification — Contract for performance of work—Solicitor employed by officer of town.]**—Under the provisions of the Towns Incorporation Act, R. S. N. S. c. 71, ss. 54 and 56, no person is qualified to be elected, or to hold office as mayor or councillor who, "directly or indirectly, by himself or with any other person, as a partner, or otherwise, enters into, or is directly or indirectly interested in any contract, express or implied, for the supply of any goods, or materials, or for the performance of any work or labour to or for the town."—Among the officials appointed by the town of W. was an inspector for the purpose of enforcing and carrying out the provisions of the Canada Temperance Act. The inspector received as salary one-half the net proceeds of fines imposed, after paying expenses, and was authorized by resolution of the town council to engage his own solicitor, whose fees were not to exceed a fixed amount in each case.—The defendant, who was elected mayor of the town, had been previously engaged by the inspector for the purpose of prosecuting cases under the Act, and at the time of his election there was due him a small sum for services rendered as such prosecutor, which was passed by the council, and paid after the election:—*Held*, that the defendant was a person directly or indirectly interested in a contract for the performance of work for the town, within the meaning of the Act, and was therefore disqualified from holding office. *Ree ex rel. McDonald v. Robertson*, 35 N. S. Reps. 348.

**2. Money payment to — By-law—Violation of procedure by-law—Discretion.]**—The Court, in the exercise of its discretion, refused, under the circumstances of the case (*STREET, J., dissenting*), to restrain a municipal corporation from acting upon a by-law for the payment of money to the mayor as remuneration for services, the money not being provided for on the face of the estimates, and the by-law being passed by the council in the face of the protest of the minority and in contravention of the procedure by-law of the council, by being taken up by the council before being submitted to a committee of the whole. *Heffernan v. Town of Walkerton*, 23 Occ. N. 222, 6 O. L. R. 79.

See *ante* IV. 3.

## XI. NUISANCE.

**1. Factories — By-law — Injunction—Penalty.]**—A municipal corporation has a right to prevent factories or

mechanisms moved by steam being erected within its limits, to pass by-laws to that effect, and to exercise, in order to have such by-laws observed, all the remedies known to the law, and particularly injunction.—**2.** A municipal corporation is not bound to impose a penalty for contravention of such by-laws. *Village of St. Agathe des Monts v. Reid*, 6 Q. P. R. 3.

**2. Sewers — Discharge into navigable waters — Special damage.]**—The defendants' sewer emptied into navigable water, in which the plaintiff's vessel was lawfully moored for the winter. The defendants, although notified of similar previous occurrences, allowed a factory to send hot water down the sewer, which melted the ice on one side of the vessel, causing damage:—*Held*, that the defendants were liable, as the plaintiffs were lawfully using the waters, and the discharge of the hot water was a public nuisance which caused special damage to the plaintiff. *Mathews v. City of Hamilton*, 6 O. L. R. 198.

## XII. POLICE OFFICERS.

**1. Liability for acts of.]**—A police officer is not the agent of a municipal corporation.—**2.** A municipal corporation is not responsible for the acts of its police officers, unless it has authorized or adopted such acts. *Tremblay v. City of Quebec*, Q. R. 23 S. C. 266.

**2. Liability for unlawful acts of — Ratification.]**—The defendants, a city corporation, were held not liable for the act of a police officer who unlawfully broke and entered the premises of the plaintiff and carried away therefrom certain intoxicating liquors there kept for sale by the plaintiff contrary to the provisions of the Canada Temperance Act, although the officer had been specially appointed to see that the Act was enforced.—When the servant of a municipal corporation does an act in which the corporation have no peculiar interest, and for which they derive no benefit in their corporate capacity, but which is done in pursuance of some statute for the general welfare of the inhabitants of the community, the servant cannot be regarded as the agent of the corporation for whose wrongful acts they would be liable, and the doctrine of *respondent superior* does not apply.—The defendants could not make themselves liable for the acts of the officer unless they ratified and adopted them with a full knowledge of their illegality. *McCleave v. City of Moncton*, 35 N. B. Reps. 296.

See *ante* II. 2.

## XIII. PUBLIC HEALTH.

**1. Exercise of right — Quarantine of house—Damage to owner—Liability.]**—The plaintiff had leased his house, situated in the city of Montreal, upon a lease to begin on the 1st May, 1901. In the month of April one of the persons who lived in the house contracted small-pox, and the municipal authorities, after removing him, put the house in quarantine, preventing all access to it, and kept it so until the 14th May. The plaintiff's tenant, therefore, was not able to take possession, and the plaintiff was obliged to cancel the lease. He now claimed damages from the city corporation for the loss of his rent:—*Held*, that, although the municipal authorities had acted in the exercise of a right and even of a duty, the corporation must pay the plaintiff for the injuries which he had suffered. *Dalbec v. City of Montreal*, Q. R. 22 S. C. 23.

**2. Liability for expenses incurred by local board of health.]**—A medical practitioner, employed by the local board of health of the city of Moncton to attend to cases of small-pox, cannot recover for his services in an action against the city. The Public Health Act, 1898, imposes upon the cities or municipalities wherein local boards of health are established, no liability, which can be enforced by action, for the expenses or contracts of such boards. *Cruise v. City of Moncton*, 35 N. B. Reps. 249.

See PUBLIC HEALTH.

## XIV. PUBLIC LIBRARIES.

**1. Aid by municipality—Grant for site—Validity of by-law—Assent of electors.]**—A mechanics' institute having been converted into a public library, and a board of management organized under R. S. O. 1897 c. 232, part II., a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate, without the assent of the electors to either the appointment of the library board or the grant:—*Held*, that the power to grant aid to free libraries is absolutely in the hands of the local municipality under the general provisions of the Municipal Act, and that the by-law was valid notwithstanding s. 18 of R. S. O. 1897 c. 232, which may have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers intrusted to particular free library boards under ss.

14 and 17 of the Act. *Hunt v. Town of Palmerston*, 23 Occ. N. 66, 5 O. L. R. 76.

**2. Gift — Breach of contract — Injunction — Ratepayer — Attorney-General.]**—A. C. made an offer to the defendants that "if the city will pledge itself by resolution of council to support a free library . . . and provide a suitable site," he would furnish \$75,000 to erect a free library building. The defendants obtained legislation enabling them to give the guarantee, and afterwards the council passed a resolution accepting the offer and giving the guarantee, which resolution was communicated to A. E., and the receipt thereof acknowledged by him. At a later meeting of the city council a resolution was passed to rescind all previous resolutions in relation to the matter:—*Held*, that there was a binding contract between the defendants and A. C., and the Court would interfere by injunction, at the suit of the Attorney-General, upon the relation of a ratepayer, to restrain a breach of the contract. The passing of the statute gave a vested interest to every citizen. *Attorney-General v. City of Halifax*, 23 Occ. N. 24.

## XV. TRANSIENT TRADERS AND HAWKERS.

**1. Conviction — Hawking goods — License — Traveller with sample.]**—One who travels about from house to house for the purpose of selling sewing machines, carrying with him only one machine as a sample, his stock being stored in a shop rented for the purpose, cannot be convicted under 53 V. c. 39, s. 4 (N. B.), of hawking or peddling goods without a license.—*Seemle*, that proof of a single act of sale of goods or merchandise against a man does not constitute him a hawker or peddler within the meaning of the above Act. *Regina v. Phillips*, 35 N. B. Reps. 393.

**2. Conviction—Penalty—Costs—Distress—Imprisonment—Uncertainty as to time and place — Amendment — "Butcher"—By-law.]**—Upon motion to quash the conviction of the defendant, a transient trader, for offering meat for sale in quantities less than the quarter carcase, without having paid a license fee, contrary to a by-law of a village:—*Held*, that it was not necessary that the by-law or conviction should contain the words "for temporary purposes" and "assessment roll for the then municipal year," as they relate to the regulation of transient traders under clause 30 of s. 583 of the Municipal Act, R. S. O. 1897

c. 223, which refers to the payment of a license fee before beginning operations; nor was it necessary to refer to or negative the provisions of 58 V. c. 42, s. 22 (O.), making the term "transient trader" applicable to one who has resided less than three months in the municipality before beginning business, the evidence shewing brief visits periodically and regularly to sell meat for a given time at a particular place in the village. — 2. The objection that the penalty of \$1 was not apportioned under s. 708 failed, because the application was otherwise provided for by the by-law. — 3. The objection that the conviction and by-law were in excess of the statute because power of distress was given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, was not well taken, having regard to the powers given by s. 702, s.-ss. 2 and 3. — 4. The uncertainty of the offence in the conviction as to date, place, and meat sold, should be cured by amendment, upon the facts in evidence, under 2 Edw. VII. c. 12, s. 15 (O.). — 5. Although ss. 580 and 581 deal specifically with the sale of meat, a transient trader, under s. 583, might include a butcher or dealer in meat. *Rea v. Myers*, 23 Occ. N. 280, 6 O. L. R. 120.

**3. Conviction — Proof of by-law — Offence—Certiorari—Costs.]**—The Municipal Ordinance (R. O. 1888 c. 8, s. 68, s.-s. 31) authorizes municipal councils to pass by-laws for "licensing, regulating, and governing transient traders and other persons who occupy premises in the municipality for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality, and the time the license shall be in force." — The defendant was convicted "for that he, the said (defendant), whose name had not been entered on the last revised assessment roll of the municipality on, etc., within said municipality, was a sewing machine agent, carrying on his business, occupation, and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of by-law No. 25 of the said municipality." — On an application for a writ of *certiorari* it appeared from affidavits filed that the original by-law was produced before the convicting justice, but that neither the original nor a copy was put in as evidence, and it was sought to prove the by-law on this application by affidavit:—*Held*, that the by-law could not be proved by affidavit on the application for the writ of *certiorari*.

—2. That therefore the only means available of ascertaining the provisions of the by-law was by reference to the information and conviction. — 3. That the offence stated in the conviction was not one which could be created by a by-law passed under the above quoted clause of the Municipal Ordinance, inasmuch as it did not allege that the defendant was "a transient trader or other person occupying premises in the municipality for a temporary period." — 4. That costs of quashing a conviction on *certiorari* will not be granted, unless there be misconduct on the part of the informant or of the justice. *Regina v. Banks*, 2 Terr. L. R. 81.

**4. License — Travelling salesman of trading corporation.]**—A person in the employ of a trading corporation (the latter having a place of business and paying the usual business and other taxes), who sells by wholesale to retail dealers and not to consumers, is not a peddler, and therefore is not obliged to take out a license or pay a special tax as such.—*Seemle*, that the calling of a peddler carries with it the idea of petty trade, or of sale by outcry and itinerancy. *City of Montreal v. Emond*, Q. R. 23 S. C. 77.

## XVI. OTHER CASES.

**1. Action against corporation — Deposit — Default — Leave to make.]**—A plaintiff who did not, at the time of the issue of a writ of summons, make the deposit required by Art. 793, C. M., in an action against a municipal corporation, may obtain permission to make such deposit at a later stage. *Prevost v. Village of Ahuntic*, 5 Q. P. R. 171.

**2. Action against corporation — Deposit—Condition precedent — Husband and wife—Parties to action—Injuries to wife.]**—The deposit of \$10 required from persons, not ratepayers, who sue a municipality for damages caused by the bad state of the pavements, is required only as security for costs; it is not a condition precedent to the right of action, and may be made in the course of the action. — 2. There is nothing improper in a wife, common as to property, being joined as a party along with her husband claiming, as chief of the community, compensation from a municipality, one part of which is based upon personal injuries suffered by her. *Prevost v. Village of Ahuntic*, 6 Q. P. R. 17.

**3. Bonds — Liability of county for parish almshouse—Certificate of indebtedness—Common counts—Mandamus.]**—By

41 V. c. 102 (N. B.) it was provided that the defendants should appoint commissioners to lease or purchase lands and erect thereon an almshouse for the parish of B. and to support and manage the same; that the cost was to be assessed by the county council on the parish; that the county council might cause bonds to be issued which should be wholly chargeable on the parish and be disposed of for the purposes of the Act; that the county council should levy upon the parish a sum sufficient to pay the principal and interest of the bonds; and that sums, when collected, should be held by the secretary-treasurer of the county for the purposes of the Act. Pursuant to this Act instruments were issued, signed by the secretary-treasurer and warden of the county, sealed with the county seal, certifying that the parish was indebted to the holder in the sum of, etc. One of these was purchased by the plaintiffs' intestate, who was named in it as the holder, and the plaintiffs sued the county corporation to recover the principal and interest thereof:—*Held*, that the defendants were not liable on a count framed on the instrument itself, nor upon the common counts, nor under 62 V. c. 67; that by 41 V. c. 102 the defendants were not authorized to issue any instrument that would create an indebtedness between them and the person advancing money upon such instrument. *Semble*, that the plaintiffs' remedy was by motion for a mandamus to compel the defendants to assess the parish for the amount of the loan and interest. *Grimmer v. County of Gloucester*, 35 N. P. Reps. 255.

**4. Boundaries — Charter — Title to fisheries.**] — By its charter the city of St. John is granted "all the lands and waters thereto adjoining or running in, by, or through the same" within defined boundaries, including a course at low water mark; "as well the land as the water, and the land covered with water within said boundaries." The fisheries between high and low water mark of the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city:—*Held*, that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour. *City of St. John v. Wilson*, 22 Occ. N. 209, 2 N. B. Eq. Reps. 393.

**5. Fines — Conviction — Fine payable to officer.**] — When it is provided by a statute that a fine shall belong to a municipal corporation, a conviction which condemns an offender to pay such a fine to an officer of the corporation, and not

to the corporation itself, is void and will be quashed upon *certiorari*. *Wilcox v. City of Montreal*, Q. R. 23 S. C. 38.

**6. Local improvements — Payment out of general funds — Illegality — Liability of councillors — Trustees — Breach of trust — Excuse — Relieving statute.**] — By a special Act of the Legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in ss. 612 and 624 of the Consolidated Municipal Act, 1883, should be by special assessment on the property benefited and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by s. 612. — In an action by a ratepayer, on behalf of all ratepayers other than the defendants, against the members of the council who sanctioned the payment out of the general funds of the town for work done in reconstructing a sidewalk, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof:—*Held*, that the members of the council who were sued, having acted in good faith and under the *bona fide* belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably and were entitled to be excused for the alleged breach of trust. *Semble*, that 62 V. (2) c. 15, s. 1, applied to these defendants; but, if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity. *King v. Ma thews*, 23 Occ. N. 109, 5 O. L. R. 228.

**7. Operation of railway — Use of streets — By-law or resolution.**] — By the Nova Scotia statute 63 V. c. 176, the appellant company were granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property:—*Held*, that such regulations could only be made by by-law, and that the by-law making such regulations would be subject to the provisions of s. 264 of the Towns Incorporation Act, R. S. N. S. 1900 c. 71. *Liverpool and Milton R. W. Co. v. Town of Liverpool*, 23 Occ. N. 180, 33 S. C. R. 180.

**8. Parks—Establishment of — By-law — Dedication of land held by corporation in fee — Subsequent leases for building purposes — Injunction — Private plaintiff — Interest.]**—A by-law was passed by the defendant corporation in 1880 purporting to establish a park on the "Island," which was granted to the corporation by the Crown in fee in 1867, and certain lots were designated therein which, "with such other lands as may hereafter be obtained from lessees or otherwise," were to form a park. Other lands were in 1887 directed to be taken and expropriated in order to enlarge the "Island Park," but no general plan or scheme for park improvements was considered till 1901, when a special committee was appointed to elaborate a plan. The defendant corporation from 1880 till 1901 acted on the belief that there was power to deal with the land designated as park land, by leasing it, imposing and collecting rent and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners. The park scheme was not abandoned, but the details and the area were modified from time to time by successive councils: — *Held*, that the corporation had not exceeded their powers in so dealing with the land designated. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee. The fact of corporate action being embodied in a by-law implies its revocability: — *Held*, also, that S., who was joined as a plaintiff, claiming under a lease made prior to the park scheme, and renewed in 1895, after registration of plans made in 1883 and 1890, which shewed that the corporation had sanctioned the subdivision of the lands in question into building lots, had not such an interest, by reason of a special grievance, as would entitle her to have the corporation restrained from granting to the defendant L. a building lease of part of the lands. *Attorney-General v. City of Toronto*, 23 Occ. N. 284, 6 O. L. R. 159.

**9. Trespass—Taking land for sidewalk — Remedy — Ascertainment of boundaries—Restoration — Amendment.]**—Action to recover the value of a strip of land in front of which a municipal corporation had laid a sidewalk. The real matter in controversy was the extent of the plaintiff's land. The Courts below dismissed the action on the ground that the proper remedy was by action *en bornage* or *au petittoire*. In order to put an end to litigation, the Supreme Court of Canada reversed the judgments below and directed that the record should be re-

mitted to the trial Court to ascertain the property affected, all necessary amendments being made, and that plaintiff's property should be restored to him, defendants having offered this in their pleading. *Burland v. City of Montreal*, 33 S. C. R. 373.

## MUNICIPAL ELECTIONS.

**1. Controverted election—Petition — Affidavit—Notice—Time—Abolition of terms—Charter of town—Incorporation of Code by reference—Construction of statute.]**—The affidavit mentioned in Rule 47 of the Rules of Practice of the Superior Court, applies only to incidental motions or petitions in the course of a pending suit, and not to such as themselves form the commencement of suits. 2. The Act 61 V. c. 20, s. 3, having abolished the terms of the Circuit Court and the Superior Court, at Quebec, there are no longer, practically, terms or sessions of the Court at Quebec, or, to put it in another way, the whole year constitutes a single term, and, therefore, if notice of a petition in contestation of a municipal election is given within 15 days after such election, it may be presented to the Court at any time afterwards. 3. In this case the charter of the corporation of the town of Levis, referring, as regards contestations of elections, to Arts. 348-358, inclusive, of the Municipal Code, and declaring that they are to be regarded as forming part of it, these Articles as they existed at the time the charter was passed by the Quebec Legislature, and not those which have since been substituted for them by the Legislature, are to be considered as incorporated in the charter. *Mercier v. Belleau*, Q. R. 23 S. C. 136.

**2. Controverted election—Petition — Affidavit—Security for costs—Terms of Circuit Court.]**—It is not necessary that a petition in contestation of a municipal election should be accompanied by an affidavit.—2. The security for costs which the party contesting the election of a municipal councillor must give, in which the surety declares that he is the owner of an immovable of the value of \$200 over and above all his debts, is sufficient.—3. Although it is declared in s. 2352, R. S. Q., that in the district of St. Francois all juridical days are term days, nevertheless, if the Bar of St. Francois has, by resolution, approved by all its members and accepted and followed for several years, fixed certain days as term days for the Circuit Court, that resolution has the force of law. *Labbé v. Morin*, Q. R. 23 S. C. 269.

**3. Controverted election—Petition—Pleading—Amendment.]**—The insufficiency of a pleading in a contestation of a municipal election, governed by the provisions of the Municipal Code, is a cause of nullity.—2. After the expiration of the time for serving the contestation an amendment will not be allowed. *Brisson v. Pelletier*, 5 Q. P. R. 295.

**4. Controverted election—Quo warranto—Contestation—Deposit.]**—The right to a seat in the municipal council of the city of Quebec may be contested by *quo warranto*.—2. The remedy by *quo warranto* under the Code of Procedure is not affected by Arts. 427 *et seq.* R. S. Q.—3. A petition invoking reasons against the validity of an alderman's claim to hold a seat in the city council of the city of Quebec, and asking that he be ousted and his seat given to the petitioner, and that the city clerk be ordered to proclaim him elected, is a contestation of the election, and therefore the deposit of \$200 required by 58 V. c. 49 (Q.), as security for the costs of contestation, must be made. *Roy v. Martineau*, Q. R. 22 S. O. 1.

**5. Corrupt practices—Effect on election—Votes of unqualified persons—Scrutiny.]**—Promises, gifts, favours, or threats, which may induce an elector to vote for a candidate, are corrupt practices, the effect of which is to annul the election of the candidate for a municipal office, whatever be the number of voters whom he has thus corrupted. But illegal votes which are so because of want of qualification of the voter, do not invalidate the election, if, such votes being deducted, the candidate elected still has a majority of legal votes. *Labbé v. Morin*, Q. R. 23 S. O. 407.

**6. Disqualification of county councillor—Membership in school board—Resignation—Relator's claim to seat—Notice to electors.]**—By 2 Edw. VII. c. 29, s. 5 (O.), s. 80 of the Municipal Act, R. S. O. 1897 c. 223, is amended so as to provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation.—The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organized, and paid over the rates levied on the section to the board of an adjoining section, which provided accommodation for the school children living within the first-named section.—*Held*, a school board for which rates are levied, within the meaning of the amendment:—*Held*, also, following *Regina*

*ex rel. Rollo v. Beard*, 3 P. R. 357, and *Regina ex rel. Adamson v. Boyd*, 4 P. R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling.—No objection to the respondent's qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths, warning the electors not to vote for the respondent:—*Held*, not sufficient to entitle the relator to the seat. *Re ex rel. Zimmerman v. Steele*, 23 Occ. N. 196, 5 O. L. R. 565.

**7. Disqualification of county councillor—Membership in school board—Statutes—Saving clause—Resignation—Relator claiming seat—Notice—Costs.]**—In a *quo warranto* proceeding in which it was sought to unseat the respondent as a county councillor because he was a member of a school board for which rates were levied, and to seat the relator:—*Held*, that the relator was not entitled to the seat, as he had not objected to the disqualification of the respondent at the nomination or given any notice on the election day to the electors that they were throwing away their votes on account of the respondent's disqualification.—2. That s. 76 of the Municipal Act does not apply to county councillors.—3. That at the time of the respondent's election he was a member of a school board for which rates were levied, and if he were then disqualified, his resignation after his election and before taking his seat would not remove his disqualification. *Regina ex rel. Rollo v. Beard*, 3 P. R. 357, followed.—4. That the words "for which rates are levied," used in 2 Edw. VII. c. 29, s. 5 (O.), disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates are levied, whether levied by the municipal corporation for which he was elected or by any other.—5. That the saving clause in s. 5 refers to the election of the member of the council of any municipal corporation, and not to the election of a school trustee. *Re ex rel. Zimmerman v. Steele*, 23 Occ. N. 196, 5 O. L. R. 565, followed.—Therefore at the time of his election as county councillor the respondent was disqualified; and a new election was ordered.—The relator was allowed the costs of the proceedings so far as he had succeeded, and the respondent his costs of opposing the application to seat the relator; such costs to be set off *pro tanto*. *Re ex rel. O'Donnell v. Broomfield*, 23 Occ. N. 202, 5 O. L. R. 596.

**8. Disqualification of township councillor—Membership in school board—Resignation—Non-acceptance—Designation of board—Relator's claim to seat—Notice to electors—Costs—Status of relator—Discretion.]—Held**, that the respondent being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been accepted by his co-trustees, was, by 2 Edw. VII. c. 29, s. 5 (O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a "board of public school trustees of union section," etc., or a "public school board."—The respondent's qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat.—*Rea ex rel. Zimmerman v. Steele*, 23 Occ. N. 196, 5 O. L. R. 565, followed.—It appearing to be the fact, but there being no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while the election was set aside and a new election ordered, no costs were given to either party. *Rea ex rel. Robinson v. McCarty*, 23 Occ. N. 203, 5 O. L. R. 638.

**9. Irregularity—Quo warranto application—Status of relator—Voting for respondent—Disclaimer.]—The relator attacked the election of the respondents as county councillors for non-compliance with certain statutory formalities:—Held**, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was *nihil ad rem*. *Rea ex rel. McLeod v. Bathurst*, 23 Occ. N. 201, 5 O. L. R. 573.

**10. Nomination of councillors—Time of holding—Irregularity—Saving clause.]—Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than 5,000 persons, and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon.—Sembie**, that an error in this respect as to the time and place of the nomination would come within the curative provisions of s. 204 of the Municipal Act, R. S. O. 1897

c. 223, and would not be a fatal objection to the validity of the subsequent election. *Rea ex rel. Warr v. Walsh*, 23 Occ. N. 94, 5 O. L. R. 268.

**11. Qualification of alderman—Bare ownership of property—Assessment roll—Inconclusiveness.]—In an action to annul the election of an alderman of the city of Montreal, for want of the required real estate qualification, the fact that the defendant's name appears on the valuation and assessment roll as "proprietor" of the property on which he qualifies, is not conclusive, and does not preclude investigation of the nature of his title, notwithstanding the final clause of s. 29 of 62 V. c. 58 (Q.), which says, that the qualification is to be established by the valuation and assessment roll in force at the date of nomination.—2.** Where it appears that the defendant is the donee of the immovable property on which he qualifies, and that by the terms of the deed of donation he has the mere ownership (*nue propriété*), the usufruct for life being reserved by the donor, he is not "seised of" and does not "possess as proprietor," within the meaning of s. 29. *Archambault v. Tansey*, Q. R. 23 S. C. 170.

## MURDER.

See CRIMINAL LAW, II. 9, 10.

## NAME.

See COVENANT IN RESTRAINT OF TRADE, 3—LIQUOR ACT OF ONTARIO, 1—WRIT OF SUMMONS, II. 2.

## NATURALIZATION.

See CONSTITUTIONAL LAW, 1.

## NAVIGATION.

See SHIP—WATER AND WATERCOURSES, 5, 6.

## NAVIGATION COMPANY.

See COMPANY, IV. 3.

## NECESSARIES.

See CRIMINAL LAW, II. 8—SHIP, I. 2.

## NEGLIGENCE.

**1. Dangerous animal—Dog—Injury to child—Contributory fault.]**—The respondent's son, aged thirteen, was provoking or exciting a bull-dog owned by the appellant, by stamping on the floor and calling him by name, when the appellant's daughter, aged nineteen, opened the door and allowed the dog to fly at the child and bite him:—*Held*, that the appellant was responsible for the injuries inflicted on the boy, notwithstanding the fact that he had irritated the dog,—a child of that age not being expected to shew the prudence and thoughtfulness which would be expected and required from an adult under similar circumstances. *Bernier v. G  n  reux*, Q. R. 12 K. B. 24.

**2. Dangerous animal—Horse on highway—Injury to child.]**—The defendant's horse being on the highway, a boy of twelve years of age approached to catch him by taking hold of a rope then around his neck, when the boy was kicked and injured. There was no evidence that the defendant knew that the horse was accustomed to stray or had any vicious propensity, nor was the horse shewn to have such fault, and there was evidence that the horse had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence and fully understood the risk he ran.—In an action by the boy and his father:—*Held*, that they could not recover. *Patterson v. Fanning*, 2 O. L. R. 462, distinguished. *Flett v. Coulter*, 23 Occ. N. 111, 5 O. L. R. 375.

**3. Defect in goods sold—Injury to purchaser—Liability of vendor—Accident.]**—The plaintiff's daughter, about eleven years of age, was injured by the bursting of a bottle containing cream soda, which had been sold to the plaintiff by the defendant, a manufacturer of soda water. The bottle had been carefully tested by the defendant before it was filled, and was more than ample to support the pressure to which it was subjected. The cause of the accident was not definitely ascertained, but it appeared to be the sudden exposure of a cold bottle in a refrigerator to a current of warm air, or, perhaps, to some unknown flaw or inequality in the glass itself:—*Held*, that, whether the accident was attributable to sudden change of temperature or to an unknown defect in the glass, the defendant, as the vendor, was not responsible, it being either the result of imprudence on the part of the plaintiff's daughter, or a case of inevitable accident. The extent of the obligation of persons

selling gaseous waters, as to the receptacles which contain them, is to take every reasonable precaution that such receptacles shall be sufficient for the purpose. *Guinea v. Campbell*, Q. R. 22 S. C. 257.

**4. Defective appliances in ship—Injury to passenger—Duty of owners—Proximate cause.]**—The plaintiff, a boy of four years of age, with his parents, was being carried as a passenger on a steamboat of the defendants. The child and his mother were in a house on the boat's deck, leading from which out on to the deck were doors fitted with appliances intended to keep them fastened back, when they should happen to be flung wide open. While the plaintiff was in the act of passing through one of the doorways, the door swung to and jammed his fingers, so that the tips of some of them had to be amputated. The plaintiff's father and elder brother swore that the fastening of the door was out of order, and would not hold it back. There was evidence to shew that the doors of the house were frequently being opened and shut by passengers and others, and that a very few minutes before the accident a passenger had gone through the doorway in question, leaving the door on the swing. It was also proved that the fastenings had been put on the doors in order to hold them open in warm weather for the purposes of ventilation:—*Held*, that there was no duty cast upon the defendants to provide the doors with the appliances mentioned or to maintain them in good working order; and, even if there were, the evidence went to shew that the proximate cause of the accident was the act of the passenger in leaving the door on the swing, for which the defendants could not be held liable. *Cormier v. Dominion Atlantic R. W. Co.*, 36 N. B. Reps. 10.

**5. Driving timber—Injury to bridge—Servitude—Watercourses—Floatable rivers—Statutory duty—Riparian rights—Vis major.]**—The Rouge river, in the Province of Quebec, is floatable but not navigable, and is used by the lumbermen for bringing down saw-logs to booms, in which the logs are collected at the mouth of the river, and distributed among the owners. The plaintiffs constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive, and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance



below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The river Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam, and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally:—*Held*, that irrespective of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused:—*Held*, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right but an easement or privilege which must be enjoyed and exercised with such care, skill, and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses. *Ward v. Township of Grenville*, 23 Occ. N. 37, 32 S. C. R. 510.

**6. Elevator — Injury to person — Bad condition of premises — Responsibility of owner to stranger.**—The plaintiff fell into the well of an elevator at the defendant's place of business and thereby injured herself. She brought action for damages alleging negligence on the part of the defendant. At the time of the accident the plaintiff was neither an employee nor a customer, but was merely a stranger upon defendant's premises:—*Held*, that the proprietor had no responsibility towards third parties who might come upon his premises without invitation or without having business to transact there. *Wiggins v. Semi-Ready Clothing Co.*, 23 Occ. N. 117.

**7. Fire—Contributory negligence — Voluntarily incurring risk — Remoteness of damages.**—The defendant was the owner of a threshing machine and a portable steam engine, and hired from the plaintiff a team of horses with a driver for use in moving the engine about and in drawing straw and grain during the work of threshing.—While threshing for a certain farmer, sparks from the engine set fire to a stack of grain, and the separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of hauling it into a place of safety; but the fire

spread so rapidly and unexpectedly before the separator could be moved or the horses detached that they were severely burned and had to be killed.—The County Court Judge, who tried the case without a jury, found that the fire had been caused by negligence on the part of the defendant's servants, also that the horses had been attached to the separator either in obedience to a call from the defendant's foreman or under his personal supervision, and that there was no negligence on the part of the plaintiff's driver:—*Held*, that the evidence fully warranted the finding of negligence, and, unless the plaintiff's driver was guilty of contributory negligence, the defendant was responsible for the loss of the horses.—2. That the driver was not guilty of contributory negligence in exposing the horses to danger, as it was not obvious, and he had acted either on the orders of the defendant's foreman or in obedience to a natural impulse to try to save the defendant's property. *Connell v. Town of Prescott*, 20 A. R. 49, 22 S. C. R. 147, followed. *Thorn v. James*, 23 Occ. N. 124, 14 Man. L. R. 373.

**8. Promissory note—Agent of bank —Neglect to take in proper form—Subsequent material alteration—Loss of remedy on note — Damages.**—The defendant, the plaintiffs' agent at a branch, accepted a promissory note, not expressed to be joint and several, as security for an advance, instead of a joint and several one, although expressly instructed to require the latter. Shortly afterwards he discovered the mistake, and, at the suggestion of one of the makers of the note, he inserted the words "jointly and severally," on the understanding that the alteration was to be initialled by all the makers. This, however, was not done, and, after consultation with the plaintiffs' solicitor, the inserted words were crossed out by the defendant. In the result the bank were held to have lost their remedy on the note on the ground of material alteration. The bank then brought this action against the defendant for damages for negligence:—*Held*, OSLER, J.A., dissenting, that the form of the note as taken was to all intents and purposes as valid as if made jointly and severally, and therefore in this regard only nominal damages could be recoverable. The defendant, also, was not liable in damages for the consequences of his subsequent acts. What he did was done in good faith, and in ignorance of the legal consequences. The defendant exercised reasonable care and diligence, in all the circumstances of the case, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable.—

Judgment of MEREDITH, C.J., awarding the plaintiffs nominal damages with costs on the appropriate scale and a set-off of costs to the defendant, affirmed. *Banque Provinciale du Canada v. Charbonneau*, 23 Occ. N. 256, 6 O. L. R. 302.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 8—**CARRIERS—CROWN**, III. 5, 6—**HUSBAND AND WIFE**, VI. 5—**LANDLORD AND TENANT**, VII. 1—**MASTER AND SERVANT**, II., III. 1—**MUNICIPAL CORPORATIONS**, VI. 1—**PARTICULARS**, 5, 6, 7—**RAILWAY**, II. 1, 2, IV., V. 3, 4, VI.—**STREET RAILWAYS**, 2, 3—**SHIP**, II.—**WAY**.

### NEW TRIAL.

**Motion for—Misconduct of jurors—Contradictory affidavits—Oral examination before Court.**]—Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney, an officer of the Court, and a number of affidavits very contradictory and of an entirely irreconcilable nature were read, under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined *viva voce* touching the matters in question. *Wood v. Le Blanc*, 36 N. B. Reps. 47.

See **COURTS**, I. 2—**CRIMINAL LAW**, II. 1, 6, 10, III. 11—**DEFAMATION**, I. 9—**EVIDENCE**, I. 4, IV. 3—**MASTER AND SERVANT**, II. 11—**PARTICULARS**, 1—**STREET RAILWAYS**, 3—**TRIAL**, II. 5—**WATER AND WATERCOURSES**, 6.

### NEWSPAPER.

See **CONTEMPT OF COURT**, 4—**COPYRIGHT**, 5—**DEFAMATION**, I. 3, 4, 5, 7.

### NOLLE PROSEQUI.

See **COSTS**, I. 3.

### NONSUIT.

See **MALICIOUS PROSECUTION**, 5—**MASTER AND SERVANT**, II. 9.

### NOTARY.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 15—**CHOSE IN ACTION**, **ASSIGNMENT OF**, 4, 5—**COURTS**, IX. 8—**DEED**, 5—**DISTRIBUTION OF ESTATES**, 1—**EVIDENCE**, II.—**OATHS**.

### NOTICE.

See **ATTACHMENT OF DEBTS**, II. 7—**BANKRUPTCY AND INSOLVENCY**, I. 2—**COMPANY**, III. 4, 6—**COPYRIGHT**, 2, 4—**CROWN**, III. 2—**EXECUTION**, I. 2, IV. 2—**INDIAN LANDS—INSURANCE**, II. 3—**LAND TITLES ACT—LIEN**, 3, 6—**LIQUOR LICENSE ACT**, VI. 1—**MALICIOUS PROSECUTION**, 3—**MASTER AND SERVANT**, I. 1, III. 4—**MORTGAGE**, 3, 4—**MUNICIPAL CORPORATIONS**, IX. 6, 7—**MUNICIPAL ELECTIONS**, 1, 6, 7, 8—**PAUPER—PRINCIPAL AND AGENT**, 4—**REGISTRY LAWS**, 1—**TRIAL**, I. 2—**TRUSTS AND TRUSTEES**, 3.

### NOTICE OF ACCIDENT.

See **MASTER AND SERVANT**, II. 8—**WAY**, I. 2.

### NOTICE OF ACTION.

1. **Bailiff—Sale of goods under execution—Public officer—Act of omission.**]—A bailiff in selling goods seized under an execution, is fulfilling public functions, and if he is sued for damages for what he has done in these circumstances, he has a right to the notice mentioned in Art. 88, C. P. C.—2. A public officer has a right to this notice as well when he is sued for an act of omission as for an act of commission. *Dion v. Richard*, Q. R. 23 S. C. 403.

2. **Churchwarden—Public officer—Money illegally spent—Damages.**]—In this action the respondent was a churchwarden, and, therefore, a public officer within the meaning of Art. 88, C. P.—2. The action, although it claimed from the respondent the repayment of certain sums which he had illegally spent in his capacity of churchwarden, was in fact an action for damages, and, therefore, the respondent had a right to the notice required by Art. 88 C. P. Default of notice rendered the action premature. *Bélanger v. Mercier*, Q. R. 12 K. B. 428.

**3. Dominion constable—Provincial Government detective—Malice — Public officer.]**—A Government detective in the Province of Quebec, appointed to that office under an order in council, who is at the same time a Dominion constable, having jurisdiction throughout the whole of Canada, is a public officer, and has a right to the month's notice mentioned in Art. 88, C. P., of an action against him for damages on account of something done by him in the exercise of his public functions, unless it be alleged and proved that he has acted maliciously and in bad faith. *McDonald v. McCaskill*, 5 Q. P. R. 266.

**4. School commissioner — Public officer.]**—A school commissioner is a public officer, who has a right to notice of action under Art. 88, C. P., and the absence of such notice is fatal to an action against him. *Carrière v. Jobin*, 5 Q. P. R. 305.

#### NOTICE OF APPEAL.

See APPEAL, I., IV. — PARLIAMENTARY ELECTIONS, IV.

#### NOTICE OF ASSIGNMENT.

See CHOSE IN ACTION, ASSIGNMENT OF, 4, 5, 6.

#### NOTICE OF CONTESTATION.

See OPPOSITION, 4.

#### NOTICE OF CROSS-APPEAL.

See PRIVY COUNCIL, 1.

#### NOTICE OF DEFENCE.

See PLEADING, VI.

#### NOTICE OF DEPOSIT.

See PLEADING, IV. 5.

#### NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 8.

#### NOTICE OF INJURY.

See MASTER AND SERVANT, II. 8—WAY, I. 2.

#### NOTICE OF INSCRIPTION.

**Time for—Demand of abandonment —Contestation.]**—The time for giving notice of inscription for hearing upon the merits of a contestation of a demand for an abandonment, is regulated by Art. 34, C. P. *Lemay v. Parizeau*, 5 Q. P. R. 427.

#### NOTICE OF MOTION.

See COURTS, II.—PEREMPTION, 4, 5.

#### NOTICE OF PAYMENT INTO COURT.

See PLEADING, X. 4.

#### NOTICE OF RETURN.

See OPPOSITION, 9.

#### NOTICE OF SALE.

See OPPOSITION, 5.

#### NOTICE OF TRIAL.

See TRIAL, IV.

#### NOTICE TO PROCEED.

See CERTIORARI, 4, 5.

#### NOTICE TO QUIT.

See LANDLORD AND TENANT, IV.

#### NOTICE TO SURETY.

See PRINCIPAL AND SURETY, 2.

#### NOVATION.

See CHOSE IN ACTION, ASSIGNMENT OF, 7—CONTRACT, V.—SALE OF GOODS, IV. 1.

## NUISANCE.

**1. Factory — Slaughter-house — Injury to neighbours.]**—The plaintiff purchased a house in the neighbourhood of a tannery which had been carried on for many years by the defendants' predecessors and himself. The locality was also largely occupied by other manufacturing establishments. The plaintiff alleged damage by the smoke, smell, and moisture emanating from the defendants' tannery. The odour was not proved to be unsanitary. Other residents in the immediate neighbourhood testified that they did not find the smoke or smell specially objectionable. It also appeared that the plaintiff had used his own property for years as a slaughter-house:—*Held*, following *Carpentier v. Ville de Maison-neuve*, Q. R. 11 S. C. 242, that neighbours are obliged to endure the reasonable inconveniences which result from neighbourhood. These inconveniences vary in kind and in extent according to the circumstances of place, and quality of the population, and must be reduced by the care and prudence of neighbours to the lowest possible limit; but under the circumstances above stated the limit had not been exceeded in the present case, especially in view of the facts that the locality was largely occupied by manufacturing industries, that the defendants' occupancy preceded that of the plaintiff, and that the plaintiff had used his own premises as a slaughter-house: *Cusson v. Galibert*, Q. R. 22 S. C. 493.

**2. Factory—Noxious odours—Municipal by-law — Extra-territorial force—Municipal corporation—Right to compel abatement.]**—A by-law of a municipal corporation imposing a penalty for sending out smoke and noxious odours, has no force outside of the limits of the municipality, and such penalty cannot be enforced against a person carrying on a manufacturing business in an adjoining municipality; but, in the present case, the plaintiffs under s. 34 of their charter, 60 V. c. 66 (Q.), had a right of action to "prohibit" (*faire cesser*) any person from allowing emanations of smoke or unwholesome odours, even when the establishments objected to were in adjacent municipalities, if such municipalities refused or neglected to abate the nuisances. *Town of St. Paul v. Cook*, Q. R. 22 S. C. 498.

**3. Factory — Smoke, vibration, and noise—Rights of neighbours—Operation of works — Authorization by statute—Damages.]**—The defendants operated a system of waterworks for the supply of water to several municipalities, including the town of Westmount. In this town, in a neighbourhood entirely residential, it constructed a pumping plant, operated

first by steam, and later by electricity. The plaintiff, proprietor and occupant of an adjoining property for many years before the construction of the defendants' works, complained of the smoke, vibration, and noise caused thereby, more especially of vibration and noise since the installation of an electric motor plant:—*Held*, that the fact that the defendants were authorized by their charter to carry on the business of supplying water and to use steam and electricity for such purpose, did not exempt them from the legal obligation of indemnifying neighbouring proprietors for the damage occasioned by the operation of their works.—2. The defendants being free to select the site for their works, the principle laid down by the Privy Council in *Canadian Pacific R. W. Co. v. Roy*, [1902] A. C. 220, with respect to damage caused by sparks from locomotives, did not apply, and the defendants were responsible for damage caused to neighbours just as any manufacturing firm incorporated by letters patent would be responsible.—3. Permanent damage, caused by depreciation of value of property, as well as damage already suffered, may be awarded in such case. — *Montreal Street R. W. Co. v. Gareau*, Q. R. 10 K. B. 417, followed. *Davie v. Montreal Water and Power Co.*, Q. R. 23 S. C. 141.

**4. Trespass — Railway — Continuing damage.]**—In 1888 the defendants ran their line through Britannia terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on that street, on which they had since carried on their foundry business. In 1900 they brought an action against the defendants, alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to the egress in consequence of such work:—*Held*, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have brought an action, in which the damages would have been assessed once for all. His right of action being barred by lapse of time the plaintiffs' action was brought, the latter could not be maintained. *Chaudière Machine Co. v. Canada Atlantic R. W. Co.*, 23 Occ. N. S. 33 S. C. R. 11.

See MUNICIPAL CORPORATIONS. XI.—TRIAL, III.

## OATHS.

**Municipal Code—Notary.]**—Oaths required by the Municipal Code may be

taken before a notary. *Mondoux v. County of Yamaska*, Q. R. 22 S. C. 148.

See PENALTIES AND PENAL ACTIONS, 2.

## OFFICIAL ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 6.

## OFFICIAL GUARDIAN.

See DEVOLUTION OF ESTATES ACT.

## OFFICIAL REFEREE.

See REFEREES AND REFERENCES, 1.

## ONTARIO ELECTION ACT.

See LIQUOR ACT OF ONTARIO—PENALTIES AND PENAL ACTIONS, 2, 3.

## OPPOSITION.

### 1. Examination of opposant —

*Wife of debtor—Old Code of Procedure.*]—The examination of an opposant, being the wife of the debtor separate as to property, may be ordered if the opposition makes no distinction between the goods which her husband possessed at the time of the marriage and those which have been acquired since.—2. The examination of the opposant may be allowed upon opposition commenced under the old Code of Procedure. *Préfontaine v. Dorval*, 5 Q. P. R. 374.

### 2. Interpellation — Service — Domicil.]

—The Court will not dismiss upon motion an opposition to a sale of immovables based upon the fact that the interpellation required by Art. 705, C.P., has been made upon a grown-up person in the family of the debtor, without naming such person, if it appears that the interpellation was made at the domicile of the debtor. *Jetté v. Désaulniers*, 5 Q. P. R. 437.

### 3. Judgment for partition — Sale

*by licitation—Time—Purchaser at sheriff's sale—Sheriff—Execution — Irregularity.*] — 1. A proceeding by which a party opposes judgments declaring the parties to an action for partition, proprietors of a certain immovable property, and ordering the same to be sold by licitation, alleging that he is the owner of

the undivided half said to belong to the defendant, and that the plaintiff's half is now under seizure at the instance of one of his judgment creditors, is a *tierce-opposition*, and is not subject to the delay fixed by Art. 1050, C. P.—2. A purchaser of part of an immovable, at sheriff's sale, becomes proprietor thereof, by the fact of the adjudication, and may oppose judgments rendered in an action for partition of that immovable, to which he is not a party, although at the time of the institution of the action, he had not paid the purchase price, and was not registered as owner.—3. Although the writ of execution had been returned into Court by the sheriff, and was not re-issued to him, a deed given by him to the purchaser, upon payment of the price, will not be set aside as irregular, especially if the party invoking such irregularity shews no interest in doing so.—4. A *tierce-opposition* need not attack the legality of the proceedings which led to the judgment complained of. *Stanbridge v. Stanbridge*, 5 Q. P. R. 140.

4. *Notice of contesting — Neglect to file—Irregularity—Motion.*]—A party cannot by motion ask to have a proceeding in an action set aside, the proceeding in this case being a notice of contesting an opposition, served but not filed; the only proper motion would be one for dismissal. *Fortin v. Drouin*, 5 Q. P. R. 282.

5. *Notice of sale—Guardian.*]—An opposition *à fin d'annuler* based upon the want of notice of sale to a guardian will not be dismissed upon motion as frivolous. *Idler v. Lanthier*, 5 Q. P. R. 294.

6. *Opposition à fin d'annuler — Frivolous ground—Delay.*]—An opposition *à fin d'annuler*, alleging that the defendant-opposant does not bear the name under which he is sued, will be dismissed upon motion as being made with the object of unjustly delaying the sale of the goods seized. *Masson v. Tellier*, 5 Q. P. R. 411.

### 7. Opposition à fin de conserver

*—Affidavit—Proof—Time.*] — When an opposition *à fin de conserver* is filed without an affidavit and without proof, the opposant will be ordered to make proof of such opposition within a time to be fixed by the Court. *Poirier v. Stadacona W. L. and P. Co.*, 5 Q. P. R. 409.

8. *Oral agreement—Previous writing—No admission of.*] — There is no ground for dismissing upon motion an opposition based upon an oral agreement, when it is alleged in support of the motion that a writing previous to the agree-

ment exists, and that writing is not admitted by the opposite party. *Trust and Loan Co. v. Bourgouin*, 6 Q. P. R. 31.

**9. Return — Notice — Contestation —Time.]**—The notice given by an opponent to the plaintiff that the opposition is returned and that it should be contested within 12 days from the service of the notice will be set aside upon motion if, at the time of such notice, the opposition has not in fact been returned. *Labelle v. Hyde*, 5 Q. P. R. 406.

**10. Sale of land by hypothecary creditor—Opposition à fin de charge—Security for realization.]**—An hypothecary creditor who puts up for sale immovable property, may demand by motion that the tenant, who makes an opposition à fin de charge based upon his lease, shall furnish security that the immovable will be sold for a sum sufficient to assure the complete payment of the debt. *Trust and Loan Co. v. Charlebois*, 5 Q. P. R. 365.

**11. Solicitor—Election of domicile—Default — Motion—Costs — Amendment —Time.]**—By virtue of Rule 63 of the Rules of Practice of the Superior Court, an opposition signed by an attorney who has not elected a domicile pursuant to Art. 86, C. P., may be set aside upon motion, but, if the applicant has suffered no prejudice, the Court will grant the motion as regards costs only, and will order that an election of domicile be made, and the time fixed by Art. 650 for contesting an opposition, if the notice therein mentioned has been given, will be extended until 12 days after the service of notice of such election. *Myers v. Mercier*, Q. R. 22 S. C. 309.

See **BANKRUPTCY AND INSOLVENCY**, I. 4—**COMPANY**, III. 1 — **COSTS**, III. 1—**DISTRIBUTION OF ESTATES**, 6 — **EXECUTION**, II. 1, 3-7, 10, IV. 1, 2, 5—**GIFT**, 8 — **HUSBAND AND WIFE**, V. 2, IX. 2—**JUDGMENT**, II. 4, 5 — **LANDLORD AND TENANT**, III. 1, 12.

## OVERHOLDING TENANTS.

See **LANDLORD AND TENANT**, V.

## OVERSEERS OF THE POOR.

See **PAUPER**, 1.

## PARENT AND CHILD.

See **CRIMINAL LAW**, II. 8—**GIFT**, 3, 9—**INFANT**, 1, 2.

## PARISH.

See **CHURCH**, 1.

## PARKS.

See **MUNICIPAL CORPORATIONS**, XVI. 8.

## PARLIAMENT.

See **CROWN**, III. 6.

## PARLIAMENTARY ELECTIONS.

- I. AGENCY.
- II. CONTROVERTED ELECTION PETITION.
- III. CORRUPT PRACTICES.
- IV. VOTERS' LISTS.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 11—**CONSTITUTIONAL LAW**, 1, 9—**LIQUOR ACT OF ONTARIO—MANDAMUS**, 1 — **PENALTIES AND PENAL ACTIONS**, 2, 3.

### I. AGENCY.

**1. Delegates to convention.]**—The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and, in acknowledging and accepting the nomination, he said: "There are three things essential to success: first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you."—*Held*, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election. *In re East Middlesex Provincial Election, Rose v. Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644.

**2. Evidence of—Canvassers—Speakers—Relatives—Scrutineers.]**—The following were held to be agents:—One who accompanied the respondent on a canvassing trip during which he spent a day canvassing for the respondent and spoke on his behalf at an election meeting at which the respondent was also present and spoke.—One who accompanied the respondent on a canvassing trip, acting as interpreter (the respondent being under the impression that he was one of his supporters), and actually worked and canvassed for him with his

authority.—The son of the respondent, who took an active interest in the election on behalf of the respondent with his knowledge, acted as scrutineer, and was furnished with a sum of money by the respondent when leaving for the polling place at which he was to act. *Leblanc v. Maloney*, 5 Terr. L. R. 402.

**3. What constitutes — Authority** — *Recognition — Delegates to convention — Canvassing — Accompanying candidate in canvass.*]—See *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

## II. CONTROVERTED ELECTION PETITION.

**1. Appeal—Settlement of case.**]—No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court.—*Semble*, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal. *In re South Oxford Provincial Election, McKay v. Sutherland*, 23 Occ. N. 41, 5 O. L. R. 58.

**2. Copy—Neglect to deposit — Local registrar — Extension of time—Terms—Costs.**] — Election petitions filed with local registrars under 62 V. (2) c. 6 (O.) are received by them as registrars of the Court of Appeal.—And, although a petitioner who does not leave with the local registrar at the time of filing the petition a copy of the petition to be sent to the returning officer, is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And where, through inadvertence, the solicitor for a petitioner had omitted to leave the copy, and applied without delay, the time was extended, and an order for the dismissal of the petition was discharged, upon terms as to costs. *In re North Grey Provincial Election, Boyd v. Mackay*, 23 Occ. N. 303, 6 O. L. R. 273.

**3. Costs—Conduct of respondent.**]—The respondent, having allowed the organization of the contest to go into the hands of persons as to whom he could not or would not give any information, and having failed to shew that he had made any serious effort to prevent illegal practices, was refused any costs of his

attendance or examination as a witness, the petition being in other respects dismissed with costs. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

**4. Costs — Counsel fees—Disbursements.**] — The fee of an advocate or counsel upon the trial of a controverted election petition is not to exceed the amount provided by 54 & 55 V. c. 20, s. 15 (D.)—2. The fee allowed by this section does not include disbursements in the cause nor the costs of preliminary proceedings. *Bergeron v. Brunet*, 5 Q. P. R. 434.

**5. Discovery — Examination for—Particulars.**]—Section 18 of the Controverted Elections Ordinance, C. O. 1898 c. 4, provides as follows: "The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance, in so far as they are applicable and not inconsistent with the provisions of this Ordinance, shall be applicable to such petition and proceedings."—*Held*, that the provisions of the Judicature Ordinance respecting examinations for discovery come within the above section.—2. That where particulars of the charges had been ordered the examination could not be compelled until after the delivery of the particulars. *Leblanc v. Maloney*, 5 Terr. L. R. 341.

**6. Evidence—Return.**]—In a controverted election petition it is not necessary that proof should be given that the respondent has been returned as member. *Leblanc v. Maloney*, 5 Terr. L. R. 402.

**7. Preliminary objections — Appeal—Stay of trial.**] — Where the respondent to a Dominion election petition has appealed to the Supreme Court of Canada from a judgment overruling his preliminary objections, the Superior Court cannot, as long as the appeal has not been decided, fix a day for trial on the merits, but the Court must stay the proceedings and postpone the trial of the petition. *Bergeron v. Brunet*, 5 Q. P. R. 156.

**8. Preliminary objections—Status of petitioner—Particulars—Corrupt practices.**]—A respondent to an election petition must, if he alleges that the petitioner's name is not lawfully upon the list of electors, point out the nature of the illegality charged.—2. The respondent will be ordered to give particulars of the corrupt practices of which he alleges that the petitioner has been guilty and the expenses which he has incurred and

the electors whom he has treated.—3. He will also be ordered to give particulars of the conspiracies of which he accuses the petitioner, the payments and promises of money or rewards which he alleges the latter has made, and the particular circumstances of each offence. *Ste. Marie v. Perrault*, 5 Q. P. R. 430.

**9. Service — Order extending time for — Grounds for.]**—An election petition filed in the clerk's office on the 17th December was sent to the petitioner at C. by registered letter on the 20th, and was received at the post office at C. on the evening of that day, but, for some reason that was not explained, the letter was not delivered, and the petitioner had no knowledge of its receipt until the 27th, the last day for service:—*Held*, that an order extending the time for service was properly made. *Re Restigouche Dominion Election, McAllister v. Reid*, 35 N. B. Reps. 390.

**10. Service — Substituted service—Order after time expired.]**—Under s. 8 of c. 20 of 54 & 55 V., substituted for s. 10 of the Dominion Controverted Elections Act, R. S. C. c. 9, the Court has jurisdiction to make an order for substituted personal service, where the application for the order is not made until after the time allowed for personal service has expired.—The order is not bad because it omits to fix a time within which the substituted service must be made.—Where the petitioner, by reason of a deception practised upon him, erroneously believed a personal service had been effected and allowed five days after the extended time to elapse before taking out the order for substituted service:—*Held*, that it was not too late. *Re York Dominion Election, McLeod v. Gibson*, 35 N. B. Reps. 376.

**11. Stay of proceedings pending appeal on preliminary objections — Trial — Time — Extension.]**—Preliminary objections to an election petition filed on the 22nd February, 1902, were dismissed by a Judge on the 24th April, and an appeal was taken to the Supreme Court of Canada. On the 31st May the Judge ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court should be given, and the same was given, dismissing the appeal, on the 10th October, making the 17th November the day fixed for the trial under the order of the 31st May. On the 14th November a motion was made before a Judge, on behalf of the member elect, to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on the 17th November,

but the Judge held that the trial could not proceed on that day, as the order for adjournment had not fixed a certain time and place, and, on motion by the petitioner, ordered that it be commenced on the 4th December. The trial was begun on that day:—*Held*, that the effect of the order of the 31st May was to fix the 17th November as the date of commencement of the trial; that the time between the 31st May and the 10th October, when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun; and that the 4th December, on which it was begun, was therefore within the six months:—*Held*, also, that, if the order of the 31st May could not be considered as fixing a day for the trial, it operated as a stay of proceedings, and the order of the 17th November was proper. *In re St. James Dominion Election, Brunet v. Bergeron*, 23 Occ. N. 147, 33 S. O. R. 137.

**12. Trial — Expenses of — Sheriff's fees — Crier's fees.]**—A sheriff has a right to a fee for attendance at the trial of a controverted election petition only if his presence at the trial has been required.—2. The fees of criers at the trial of election petitions will be taxed. *Bergeron v. Brunet*, 5 Q. P. R. 433.

**13. Trial — Production of voters' lists — Certified copies — Costs.]**—Since the Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the Clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition, and the costs occasioned by procuring his attendance will not be allowed to the successful petitioner as against the respondent, but instead thereof only what the certified copies of the necessary parts of the lists, if procured, would have cost. *In re Lisgar Dominion Election*, 14 Man. L. R. 268.

### III. CORRUPT PRACTICES.

**1. Bribery — Offer not accepted.]**—Where a charge is made of an offer not accepted of money to influence a voter the evidence is required to be particularly clear and conclusive. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

**2. Bribery — Treating — Evidence — Particulars.]**—See *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.



**3. Conveying voters to poll — Onus.**—The taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, or the giving to a voter of a free pass or ticket by railway, boat, or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote, is not a corrupt practice, and the onus is on the petitioner to prove that the railway tickets supplied had been paid for. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

**4. Dismissal of charges against candidate and agents — Concurrent findings of both trial Judges—Disagreement of trial Judges—Right of appeal.**—The Judges at the trial of an election petition, having reserved judgment in respect of five charges, subsequently gave judgment dismissing four of these charges, both Judges agreeing as to the result. In respect to the fifth charge—a charge of payment of money by the candidate to a voter to induce such voter to vote for him—the Judges disagreed, one Judge being in favour of the dismissal of the charge, the other being of the opinion that the charge was proved:—*Held*, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal:—*Held*, also, that the portions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Election Act, which are in *pari materia*; that the words “or otherwise” in s.s. (5) of s. 57 of the Controverted Elections Act extend the effect of that subsection to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice, and that s.s. (6) extends it to candidates and others. That if an appeal lies in case of a disagreement between the trial Judges, a judgment in appeal finding a candidate or other person guilty of a corrupt practice would necessarily subject him to disqualification or other disability or penalty, notwithstanding the absence of a concurrent judgment to that effect of the two trial Judges, and that this would be contrary to the statute:—*Held*, MACLAREN, J.A., dissenting, that an appeal did not lie in respect of any of the charges. *In re Lenoar Provincial Election, Perry v. Carscallen*, 23 Occ. N. 255, 6 O. L. R. 203.

**5. Disqualification of candidate.]**—The judgment of the trial Judges un-

seated and disqualified the member-elect. On appeal the members of the Supreme Court of Canada were equally divided in opinion, and the judgment stood affirmed. *In re St. James Dominion Election, Brunet v. Bergeron*, 34 Occ. N. 147, 33 S. C. R. 137.

**6. Treating — Antecedent habit — Candidate.]**—The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election:—*Held*, that under s.s. 2 of s. 162 (added by 62 V. (2) c. 5, s. 7 (O.)), treating generally or extensively or miscellaneously is only *prima facie* a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of s.s. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent:—*Held*, also, that, although the respondent did not become a “candidate,” within the meaning of s. 2, s.s. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected. *Youghal Election*, 3 Ir. R. C. L. 53, 1 O.M. & H. 291, followed. *In re East Middlesex Provincial Election, Rose v. Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644.

**7. Treating — Committee meeting.]**—Upon a charge of treating a committee meeting held at an hotel, the evidence was that McC., who was found to be an agent of the respondent, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made:—*Held*, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence. *In re East Middlesex Provincial Election, Rose v. Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644.

**8. Treating — Intent.]**—Section 109 of the Dominion Election Act, 1900, is new, and goes far in advance of the

former law as to treating voters at an election in omitting the element of corrupt intent, and should be strictly construed. Under it, the providing or furnishing of refreshments or drink would not be an offence unless done at the expense of the candidate. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

**9. Treating — Intent—Candidate.]**—It was shewn that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ for the election was issued, on the 22nd April:—*Held*, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided. *West Wellington Case*, 1 E. C. 16, distinguished. *In re East Middlesex Provincial Election*, *Rose v. Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644.

**10. Treating — Intent — Custom.]**—The treating of electors prior to and on polling day by an agent of the respondent, although done on a liberal scale, will not be assumed to have been done with the corrupt intent necessary to make it an offence, when the Court is satisfied that he was accustomed to keep at all times considerable quantities of liquors on hand and to supply them quite freely to others in the way of hospitality or as a matter of business, and there is no other evidence to shew that the treating was done in order to influence a voter or voters.—The same rule applies to treating when done in compliance with a custom prevalent in the country and without express evidence of any corrupt intent in so treating; also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

**11. Treating — Intent — Custom.]**—Where a person who was held to be an agent gave two bottles of whisky to an elector the day before polling day, the inference of fact was drawn that they were given with the corrupt intent of influencing the voter, although there was no direct evidence to shew the object for which they were given.—Where a quantity of whisky was obtained from one

agent of the respondent and taken to the home of another in the vicinity of one of the polling places, where it was drunk freely on election day by the electors generally, the inference of fact was drawn that it was provided by both these agents for the purpose of influencing the electors, though there was no direct evidence to that effect, and it was held to be a corrupt practice notwithstanding that apparently it did not have that effect.—The evidence also shewed that a quantity of whisky was taken to a place in the vicinity of another polling place by an agent, where it was consumed by the agent and others on polling day:—*Held*, that this shewed a scheme on the part of the respondent's agents to influence the voters generally, and procure the election of the respondent by providing whisky at each of the polling places.—*Quære*, whether an agent accustomed to carry about with him a bottle of whisky to treat those whom he should happen to meet, should not, if following this custom while actually engaged in canvassing, be held to have treated with a corrupt intent. *Leblanc v. Maloney*, 5 Terr. L. R. 402.

**12. Treating — Meeting of electors — Individuals.]**—The respondent requested M., who was found to be an agent, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would go to the inn, he would "leave a drink for them there." This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it:—*Held*, that a charge of treating a meeting assembled to promote the election, under s. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under s. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men. *In re East Middlesex Provincial Election*, *Rose v. Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644.

See *ante* II. 8.

## IV. VOTERS' LISTS.

**Notice of appeal — Leaving at clerk's residence.**—The language of R. S. O, 1897 c. 7, s. 17, s.-s. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute.—And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling-house, by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient. *In re Voters' Lists of Hungerford*, 23 Occ. N. 43, 5 O. L. R. 63.

See *ante* II. 13.

## PART PAYMENT.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 16—VENDOR AND PURCHASER, 6.

## PART PERFORMANCE.

See **SPECIFIC PERFORMANCE**, 4, 5—VENDOR AND PURCHASER, 4.

## PARTICULARS.

**1. Account — Amendment at trial—Refusal of postponement — Surprise — New trial.**—Declaration for work and labour and on an account stated. Pleas, payment and set-off, the particulars of which shewed a considerable sum due the defendants over and above what was claimed by the plaintiff's particulars, which were confined to the count for work and labour. At the trial, where a verdict passed for the plaintiff, the set-off being entirely rejected, an application was made to amend the plaintiff's particulars by making a large addition to the time of the alleged work and labour and by giving particulars of the account stated. The amendment was allowed without terms, although the defendants produced affidavits of one of themselves and their attorney and counsel, stating that they were unprepared to make their defence at the then circuit to the claim

of work and labour as set out in the amended particulars; that had the original particulars been served as amended they might have offered to suffer judgment and would have done so had they found the plaintiff's claim was correct; that, as no particulars had been served applicable to the count for an account stated, that count had not been regarded as *bond fide*, and in preparing for trial no consideration had been given to it; that if the amendment was allowed the defendants would be taken by surprise and were not prepared to make their defence, and great injustice would be done to them:—*Held*, that the defendants' affidavit shewed that the amendment was of a character to materially prejudice the defendants, and should not have been allowed without such terms as would, as nearly as might be, place the defendants in the position they occupied when the original particulars were served; and a new trial was ordered. *Hicks v. Ogden*, 35 N. B. Reps. 361.

**2. Account — Partnership — Interests of partners.**—It is not necessary for a defendant, sued in assumpsit, to know the respective interests of each one of the plaintiffs in their partnership, nor to know the minor details of an account already for the most part paid. *Calaghan v. Rutherford*, 5 Q. P. R. 303.

**3. Breach of contract — Statement of damage.**—In an action for damages resulting from a breach of contract, an allegation that the plaintiff has, through the breach, lost his custom and a large sum of money, by the ruin of his business, is sufficiently particularized. *Gratton v. Dagenais*, 5 Q. P. R. 261.

**4. Damages — Plea that damage caused by plaintiff's own acts.**—When, in pleading to an action for damages, the defendant alleges that if the plaintiff has suffered any damage, which is denied, such damage is due to his own acts, the defendant will be ordered to give particulars of these acts of the plaintiff, and will not be allowed to prove other acts than those which he enumerates. *Montreal and St. Lawrence Light and Power Co. v. Stillwell*, 5 Q. P. R. 148.

**5. Negligence — Knowledge.**—Particulars are ordered for the purpose of forwarding the applicant's case, and not to hamper the party ordered to give them. When a plaintiff is ordered to give particulars of negligence which are essentially within the defendant's knowledge, the order may provide that the plaintiff shall not be confined at the trial to the particulars given. *Alaska Packers Association v. Spencer*, 9 Brit. Col. L. R. 473.

**6. Negligence—Personal injuries—Holds of damage — Admission of liability.]**—A plaintiff who claims damages for injuries caused by an accident, must give particulars of the amounts which he claims: (1) for medical services, nursing, and medicines; (2) for injury to his clothing; (3) for other injuries alleged in his declaration.—2. A plaintiff will be ordered to furnish particulars of the time and place at which the defendant admitted owing him or promised to pay him the amount claimed, or at the least to indicate the circumstances in which such promise was made. *Poole v. Hogan*, 5 Q. P. R. 424.

**7. Negligence — Pleading.]**—In an action for damages for personal injuries, paragraph 5 of the statement of claim contained allegations of negligence which might or might not have been particulars of the negligence alleged in paragraphs 3 and 4:—*Held*, that the plaintiff must give particulars or else state that they were to be found in paragraph 5. *Kingswell v. Crow's Nest Pass Coal Co.*, 9 Brit. Col. L. R. 518.

**8. Time for service — Dies non—Filing.]**—Particulars ordered to be furnished within a certain delay, may, if such delay expires on a *dies non*, be furnished on the next juridical day.—2. It is sufficient that particulars be served upon the opposite party within the delay fixed without being filed in Court, and such particulars will not be struck out of the record because they were only filed in Court on the day following that of their service upon the opposite party. *Germain v. Hurtcau*, 5 Q. P. R. 380.

**9. Vendor and purchaser—Action en garantie — Concealed defects.]**—An allegation of concealed defects in an action *en garantie* by a purchaser against his vendor, is sufficient without other particulars, when a copy of the declaration in the principal action is annexed to the demand *en garantie*. *Goltman v. Hoare*, 5 Q. P. R. 321.

**10. Vendor and purchaser — Action for price of land — Plea — Fraud of vendor — Quantity of land.]**—A defendant, sued for the price of land sold, must indicate, if he complains of having been induced to sign the agreement for purchase by reason of fraud of the vendor, the particulars of that fraud.—2. A defendant who complains that the extent of the lands bought by him was not mentioned in the agreement for sale, must indicate their true extent. *Prefontaine v. Bergeron*, 5 Q. P. R. 133.

See ASSAULT—DEFAMATION, I. 6—HUSBAND AND WIFE, VIII. 3—MASTER

AND SERVANT, III. 3—PARLIAMENTARY ELECTIONS, II. 5, 8, III. 2—PARTITION, 1—TRUSTS AND TRUSTEES, 1.

## PARTIES.

**1. Defendants by counterclaim —Addition of — Pleading.]**—The practice of the Supreme Court of the Territories permits a defendant to set up a counterclaim which raises questions between himself and the plaintiff, along with other persons, and to add such other persons as parties by counterclaim; the English practice respecting counterclaims contained in Order 21, rr. 11, 12, 13, 14, and 15, being in force in the Territories. *Robertson v. White*, 5 Terr. L. R. 311.

**2. Defendants by counterclaim —Service out of jurisdiction—Cause of action.]**—T., the British Columbia agent for the P. C. Line of Seattle, sued McM., the agent of the D. and W. H. N. Co., on a bill of exchange drawn by McM. on the company in favour of T. This bill was for the balance of freight moneys due under a charterparty entered into between the principals; and the company, having a claim against the P. C. Line for demurrage, obtained an order adding the company as party defendants, and giving them and McM. leave to deliver a counterclaim and serve it upon the P. C. Line (9 Brit. Col. L. R. 171, 22 Occ. N. 421).—An order was then made giving leave to McM. and the company to serve notice on the P. C. Line of the defence and counterclaim:—*Held*, that, as no cause of action or counterclaim against T. was shewn, there was no "action properly brought against some other person duly served within the jurisdiction," and hence there was no jurisdiction to make the order. *Trowbridge v. McMillan*, 9 Brit. Col. L. R. 443.

**3. Joinder of defendants — Alternative claims—Rule 186.]**—A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price:—*Held*, that this could not be done, the relief claimed against the railway company being based on the assumption that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him. *Quigley v. Waterloo Manufacturing Co.*, 1 O. L. R. 606, and *Evans v. Jaffray*, 1 O. L. R.

614, applied. *Chandler and Massey, Limited, v. Grand Trunk R. W. Co.*, 23 Occ. N. 172, 194, 5 O. L. R. 589.

**4. Joinder of defendants** — *Contract—Undivided share in mining right—Rescission—Parties to contract.*—A person who has acquired an undivided share in a mining right, has no right of action to set aside the contract by virtue of which his share has been transferred to him, without bringing before the Court all the parties to the contract. *Jeanotte v. Caron*, Q. R. 23 S. C. 540.

**5. Joinder of defendants**—*Principal and agent—Order 16, Rules, 4, 6.*—Action against an agent and his undisclosed principal for damages for breach of contract. In the defences a point of law was raised that it was not competent to the plaintiff to join both in the same action:—*Held*, that under the old practice it was competent to the plaintiff to sue the agent in one action and the principal in another, but his remedy was limited to a judgment in one action. Having regard to these principles, Order 16, Rules 4 and 6, are wide enough to admit of the action being brought against both. The claim is not in the alternative. The plaintiff cannot recover against both, and must make his election before judgment. *Honduras R. W. Co. v. Tucker*, L. R. 2 Ex. 305, and *Thompson v. London County Council*, [1899] 1 Q. B. 845, referred to. *Hart v. Bissett*, 23 Occ. N. 335.

**6. Joinder of plaintiffs**—*Cause of action—Exception to form.*—Where two plaintiffs complain of the same grievances, and each one invokes a right of action proceeding from the same source, and their conclusions are to the same effect, the claims may be joined together by the plaintiffs, who can institute them only as a single suit, and in such a case the suit will not be dismissed upon exception to the form. *Slater Shoe Co. v. Trudeau*, 5 Q. P. R. 314.

**7. Joinder of plaintiffs**—*Cause of action—Injuries received in same collision—Adding plaintiff.*—Rule 206 is to be read in connection with Rule 185, and parties to an action who might have been joined under the latter may be added by way of amendment under the former.—In an action against a street railway company for damages for running an electric car into the plaintiff and his horse and waggon in which his son was seated with him, who was also injured, the son was added as a party plaintiff in an action already commenced by the father alone. *Liddiard v. Toronto R. W. Co.*, 23 Occ. N. 156, 5 O. L. R. 371.

**8. Representation** — *Members of trade union.*—The plaintiff sought an injunction against an unincorporated musical protective association restraining them from making a member of that body break a contract which he had entered into with the plaintiff to supply an orchestra to the latter's theatre, and made the president and six other officers or leading members of the association defendants as representing the association:—*Held*, that under Rule 200 the plaintiff was entitled to an order that the defendants might be sued and authorized to defend on behalf of all the members of the association. *Small v. Hyttenrauch*, *Cresswell v. Hyttenrauch*, 23 Occ. N. 261, 6 O. L. R. 388.

**9. Third party** — *Cross-demand—Principal demand—Contract.*—When a cross-demand arises from the same cause as the principal demand, the cross-plaintiff may have the proceedings stayed for sufficient time to bring before the Court a third person who was a party to the contract upon which the principal demand is based. *Larue v. Gerth*, 5 Q. P. R. 322.

**10. Unincorporated association**—*Salvation Army—Action for tort.*—The Salvation Army is an unincorporated religious society, and an action cannot be maintained against it for torts committed by its officers.—The judgment in this action on the motion to set aside the writ of summons, reported 5 O. L. R. 585, 23 Occ. N. 229, considered and not followed. *Kingston v. Salvation Army*, 23 Occ. N. 329, 6 O. L. R. 406.

**11. Unincorporated association**—*Service of process on religious body.*—The Salvation Army, the duly appointed officers of which are entitled under R. S. O. 1897 c. 162, to solemnize marriages, and which, under R. S. O. 1897 c. 307, may hold property in Ontario, may be sued in the Courts of Ontario. *Kingston v. Salvation Army*, 23 Occ. N. 229, 5 O. L. R. 585.

See APPEAL, II. 5—ASSESSMENT AND TAXES, VII. 3—ATTACHMENT OF DEBTS, II. 8—CONSTITUTIONAL LAW, II.—CONTRACT, V.—COSTS, V. 3—DISCOVERY—EXECUTION, IV. 2—FRAUDULENT CONVEYANCE, 2—HUSBAND AND WIFE, V. 1, VI.—MISTAKE—MORTGAGE, 1—MUNICIPAL CORPORATIONS, I. 6, XVI. 2—PARTITION, 1. 2—PATENT FOR INVENTION, 3—PEREMPTION, 7—RAILWAY, VII. 1—REGISTRY LAWS, 2—SPECIFIC PERFORMANCE, 1—TRUSTS AND TRUSTEES, 8—VENDOR AND PURCHASER, 8—WATER AND WATERCOURSES, 7—WRIT OF SUMMONS, I. 4, 10.

## PARTITION.

**1. Particulars—Inscription in law—Parties—Addition of.]**—If it does not clearly appear from the declaration that a certain person predeceased another, the defendant, in an action for partition, may ask for further particulars, but cannot inscribe in law.—**2.** The fact that all necessary parties have not been brought before the Court is no ground for the dismissal of an action, but when the original parties fail to add the necessary parties, the Court itself should order the calling in of said parties. *Hurtubise v. Stamford*, 5 Q. P. R. 151.

**2. Parties — Tenants in common—Lease — Infant—Repudiation.]**—The plaintiff, having when he came of age repudiated a lease to the defendants of land of which he and his brother and sister were tenants in common, made when he was an infant, and having made a partition by deed with his brother and sister, to which the defendants were not parties:—*Held*, *MACLENNAN, J.A.*, dissenting, that the brother and sister were necessary parties to the plaintiff's action for a partition as against the defendants in respect of their possession under the lease.—Judgment of a Divisional Court, 4 O. L. R. 36, 22 Occ. N. 231. reversed, and judgment of *MEREDITH, C.J.*, *ib.*, restored. *Monro v. Toronto R. W. Co.*, 23 Occ. N. 165, 5 O. L. R. 483.

**3. Pleading — Share of plaintiff — Quantum.]**—A defendant, sued for partition of an estate, cannot plead that the plaintiff's share is less than that which he alleges by his declaration. *Cabana v. Latour*, Q. R. 23 S. C. 255.

**4. Proving lunacy—Costs—Apportionment.]**—In a suit for partition and sale of lands made necessary by reason of a co-tenant being a lunatic, her lunacy was proven by affidavit under s. 80 of 53 V. c. 4.—A motion that the costs of appointing a guardian to such lunatic and of proving the lunacy be charged upon the lunatic's share of the proceeds of the sale of the land in the above suit, was refused. *Masters v. Masters*, 23 Occ. N. 266.

See *LIS PENDENS*, 2—*OPPOSITION*, 3—*REGISTRY LAWS*, 1—*TENANTS IN COMMON*.

## PARTNERSHIP.

**1. Advocates — Firm debt—Several or joint liability — Promissory note.]**—The members of a partnership, in this case a firm of advocates, are not respon-

sible severally for partnership debts, and they are not liable to third persons except jointly in equal parts; this distinction applies to commercial debts which the partnership may contract, as, for instance, a promissory note signed in the firm name. *Drouin v. Gauthier*, 5 Q. P. R. 211.

**2. Agreement to form—Failure to furnish capital—Dissolution—Account.]**—A contract by which two persons agree to enter into partnership from a fixed date, which also defines the nature of the business to be carried on, the contributions and shares of the partners, and stipulates a forfeit in case of non-fulfilment of the agreement, creates a valid partnership on and from the date appointed.—**2.** The failure of one partner to formally tender his share of the capital does not necessarily prevent such agreement from having effect. He would be liable to interest from the day on which he made default to pay, and his partner would have a right to obtain damages and demand a dissolution of the partnership if the default continued.—**3.** The fact that one of the partners, after acting with the other as his partner, secretly registered the business in his own name, and asserted that he was not a partner, is sufficient ground for an action by the other partner for dissolution of the partnership and for an account. *Whimbey v. Clark*, Q. R. 22 S. C. 453.

**3. Appointment of liquidator — Discretion of Court.]**—Petition for the nomination of a liquidator for a limited partnership. By the terms of the partnership agreement, the plaintiff was to furnish his time and skill, and the defendant was to provide the capital. Each party was to draw \$20 a week salary. After doing business for five weeks, the firm got into difficulties. The plaintiff ceased work, and brought this action for the appointment of a liquidator. He had at that time drawn out \$112:—*Held*, that the appointment of a liquidator was in the discretion of the Court; that in the present instance it would be merely imposing a useless expense upon the defendant, as the whole cost would fall on him, the plaintiff having no pecuniary interest in the business; and the petition was dismissed with costs. *Sorignet v. Henry*, 23 Occ. N. 118.

**4. Company name — Security for costs—Foreign residence of partners — Powers of attorney — Authorization.]**—Although a partnership (formed for the purpose of carrying on insurance business) is authorized by law to sue in its company name, the real parties to the suit are the members of the partnership,

and if they are non-resident the partnership will be condemned to furnish security for costs when bringing suit in this Province.—2. The production of a power of attorney must be made in the suit where the same is required; and the deposit of a power of attorney at the office of the prothonotary, in compliance with the Insurance Act, is insufficient.—3. The power of attorney required by Art. 177, Q. P., must confer upon a resident of Canada power to institute suit on behalf of the plaintiffs. *Liverpool and London and Globe Ins. Co. v. Macdonald*, 5 Q. P. R. 157.

**5. Creditors of partner—Diversification of money by formation of partnership—Fraud—Action paulienne—Assignment—Gift—Personal debt—"Person."**—A partnership cannot be annulled as having been formed in fraud of the creditors of one of the partners, unless its formation has caused them prejudice, and unless the person with whom their debtor has contracted, knew at the time of its formation that it would cause them this prejudice.—2. A creditor who is in a position to bring an action to set aside a transaction as fraudulent, has no right to demand that a third person, who has dealt with his debtor, shall be condemned to pay him what the latter owes him.—3. The payment by a person forming a partnership into the business of fund which constitutes all his property, is not an act *à titre universel*.—4. An assignment, even *à titre universel*, does not bind assignee to the payment of the debts of the assignor, unless the assignment is made by way of gift, and not if it is made *à titre onéreux*.—5. When two partners are sued jointly and severally and as partners for a debt alleged to be a debt of the partnership, but which is really only the personal debt of one of the partners, the partner who is the debtor may be, in the action so begun, condemned alone to pay the debt.—*Quære*: Does a partnership in a collective name constitute a "person?" *Walker v. Lamoureux*, Q. R. 21 S. C. 492.

**6. Dissolution — Contracts previously made.**—Notwithstanding the dissolution of a partnership, a partner continues, until a receiver is appointed, to have the same power that he had before the dissolution to complete contracts previously made, for the purpose of winding up the partnership affairs. *Hale v. People's Bank of Halifax*, 23 Occ. N. 157, 2 N. B. Eq. Reps. 433.

**7. Dissolution — Interlocutory injunction—Assets.**—A partner in the course of an action for dissolution of the partnership has, against his co-partner, the right to an interlocutory injunction

to restrain the latter from continuing to infringe the rule that the partners must continue in the same position as regards the assets until the action has been tried out. *Bourdon v. Dinelle*, 5 Q. P. R. 240.

**8. Promissory note — Joint liability.**—The obligation of the members of a partnership, who sign a promissory note in their partnership capacity, is joint and not several. *Drouin v. Crauthier*, Q. R. 12 K. B. 442.

**9. Salary of one partner as government architect—Right of co-partner to share in—Receiver—Book debts.**—While C. and M. were in partnership as architects, M. received an appointment from the Dominion government as supervising architect and clerk of the works in connection with a government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary.—C. sued for a declaration that he was entitled to half the salary since the dissolution, and asked that a receiver be appointed of it, and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:—*Held*, by the full Court, that no receiver of the salary could be appointed; that, although the amount of the book debts was small, there should be a receiver in respect to them.—*Per HUNTER, C.J.*, at the trial:—Even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the salary after the dissolution of the firm, unless there was a special agreement to that effect. *Cane v. Macdonald*, 23 Occ. N. 32, 9 Brit. Col. L. R. 297.

See BANKRUPTCY AND INSOLVENCY, V. 2—BILLS OF SALE AND CHATTEL MORTGAGES, 2 — CONTRACT, VIII. 2—COSTS, V. 2—COVENANT IN RESTRAINT OF TRADE, 2, 3—GIFT, 6 — INJUNCTION, 6—PARTICULARS, 2—PEREMPTION, 4, 5—PLEADING, X. 3—SCHOOLS, 4.

## PASSENGER.

See NEGLIGENCE, 4 — RAILWAY, VI., VIII. 1—STREET RAILWAYS, 2, 3.

## PATENT FOR INVENTION.

**1. Anticipation—Novelty.**—A patent for prisms intended for use in deflecting the course of rays of light falling

obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses or shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements.—*Scumble*, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass, it would fail for want of novelty. *Luxfer Prism Co. v. Webster*, 22 Occ. N. 426, 8 Ex. C. R. 59.

**2. Combination — Novelty — Infringement.**]—A patent for a mechanical combination is not infringed unless the combination is taken in essence and in substance. *Jones v. Galbraith*, 9 Brit. Col. L. R. 521.

**3. Infringement—Parties to action —Service out of the jurisdiction—Domicil.**]—To an action by the holder of a patent of invention against persons resident within the jurisdiction for an injunction against infringement of the patent and damages, other persons not within the jurisdiction, who make and sell to the defendants the goods which are the subject of the plaintiff's complaint under another patent which the plaintiff alleges to be null and void, are neither necessary nor proper parties, and service upon them of an amended statement of claim asking for damages and an injunction against them and for a declaration that their patent is null and void, will be set aside with costs.—The statement of claim did not allege that the non-resident parties had done anything as to which an injunction could be asked against them in Manitoba, and upon its allegations the only relief the plaintiffs could possibly claim against them would be a declaration that their patent was null and void, thus raising two distinct and separate causes of action, one against the parties within the jurisdiction and the other against the non-resident parties, both of which issues should not be tried in one action.—Under the Patent Act, R. S. C. c. 61, as amended by 53 V. c. 13, the Court has no jurisdiction to impeach a patent held by a person whose domicile is in another Province, but could only, on the application of a defendant sued in this Province for an infringement of such a patent, declare it to be void as against him, leaving it *prima facie* valid as against everyone else. *Maw v. Massey-Harris Co.*, 23 Occ. N. 26, 14 Man. L. R. 252.

**4. Manufacture — Extension of time.**]—A patent of invention expires in two years from its date, or at the expiration of a lawful extension thereof, if the inventor has not commenced and con-

tinuously carried on its construction or manufacture so that any person desiring to use it could obtain it or cause it to be made.—A patent is not kept alive after two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it, if he has not commenced to manufacture.—*Smith v. Barter*, 2 Ex. C. R. 474, overruled on this point.—The power of extension beyond the two years given to the commissioner of patents, or his deputy, can only be exercised once.—*Quere*: Can it be exercised by an acting deputy commissioner? *Pouet v. Griffin*, 23 Occ. N. 79, 33 S. C. R. 39.

See EXECUTION, III. 3, 4.

## PAUPER.

**1. Maintenance — Liability of overseers—"Expenses necessarily incurred"—Notice.**]—The defendants declined to pay expenses incurred by the plaintiff in connection with the support and maintenance of C. and her infant child, paupers chargeable to the district, on the ground that the paupers in question had been placed with D. by the overseers, and that they were removed by the plaintiff from the house where they had been placed to his own house, without the knowledge and consent of the overseers:—*Held*, assuming this to be the case, and that the plaintiff had acted improperly in connection with the removal of the paupers, he was under no obligation to support them longer than he chose to do; that the paupers remained chargeable to the district; and that the defendants, after notice from the plaintiff, must remove the paupers, and provide for them, or pay all charges thereafter necessarily incurred for their support.—The care of C., while ill and confined to bed, charges for medical attendance, and expenses of burial, were all necessary expenses, for which the plaintiff was entitled to recover.—Medical attendance was an expense necessarily incurred, for which the plaintiff was entitled to recover, although he had not actually paid the bill, such attendance having been furnished at the plaintiff's request, and on his responsibility.—The notice given by the plaintiff to the overseers to provide for C., must be held to apply to and include her infant child, who, to the defendants' knowledge, was living with her, although the child was not specially mentioned in the notice. *Naas v. Overseers of the Poor for District No. 3*, 35 N. S. Reps. 316.

**2. Relief — Expenses necessarily incurred—Proceedings to recover—Exami-**



*nation—Notice—Pleading—Reduction of amount.*]—In an action by the overseers of the poor district of one county against the treasurer of another county, to recover expenses incurred in and about the removal of a pauper, pursuant to an order for removal, and of the relief, on examination, of the pauper, previous to such removal, the order for removal was impeached, on the ground that it did not shew, on its face, that the pauper was examined previous to such removal:—*Held*, following *Rea v. Tavistock*, 3 D. & R. 431, that this was unnecessary.—The defendant, having had notice of the amount claimed, should have pleaded, if he considered the amount excessive.—A statement of claim was good which set out the following particulars, viz., the application to the plaintiffs for relief; that the pauper had no settlement there; examination of the pauper under oath; transmission to the defendant of copies of the depositions; neglect to remove; the making of the order for removal; the amount of expenses necessarily incurred; demand for payment, and refusal.—Nevertheless, as the amount claimed appeared to be excessive, the order for judgment for the plaintiffs should be conditioned upon an undertaking on the part of the plaintiffs to reduce the amount. *Cumberland Overseers of the Poor v. McDonald*, 35 N. S. Reps. 394.

See PEREMPTION, 3 — WRIT OF SUMMONS, I. 7.

### PAYMENT.

See ATTACHMENT OF DEBTS, II. 11—BANKS AND BANKING, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 8, 9, 13, 16, 17—CONTRACT, III. 2, VI. 1 — INSURANCE, III. 6—JUDGMENT, IV. 5—PILOTS, 1—PLEADING, VII. 4—PRINCIPAL AND SURETY, 2—SPECIFIC PERFORMANCE, 3—SUBROGATION—TRUSTS AND TRUSTEES, 2—VENDOR AND PURCHASER, 1, 6, 10—WILL, I. 3.

### PAYMENT INTO COURT.

See COSTS, VI. 10, 14—LUNATIC, 1—PLEADING, IX. 1, X. 4.

### PEACE OFFICER.

See CONTEMPT OF COURT, 1.

### PEDDLERS.

See MUNICIPAL CORPORATIONS, XV.

### PENALTIES AND PENAL ACTIONS.

**1. Action for penalty — Non-registration of declaration — Agent of insurance company — Registration on day of service of writ—Institution of action.**]—The institution of an action dates from the service of the writ, and not from the issue of the writ, and hence, in a *quidam* action against the agent of an insurance company to recover a penalty for failure to register the declaration required by Art. 4754, R. S. Q., a certificate shewing that the declaration had not been registered within sixty days nor up to the date of issue of the writ, is insufficient to establish default, where it appears that the writ was not served until four days after its issue, and that the declaration was duly made and registered on the day of such service. If the writ was served before registration, the burden of proving that fact was on the plaintiff, which proof he had not made. *Inglis v. Aitken*, Q. R. 23 S. C. 528.

**2. Ontario Election Act—Bribery —Recovery by action — Agent at poll—Certificate — Neglect to take oath—Reduction of penalty.**]—An action will not lie under s. 195 of the Ontario Election Act, R. S. O. 1897 c. 9, for the pecuniary penalty for the offence of bribery prescribed by s. 159, s.s. 2, as amended by 63 V. c. 4, s. 21, until after conviction.—The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs.—The defendant was held liable to a penalty of \$400 under s. 94, s.s. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was reduced to \$40, as in the preceding case. *Carey v. Smith*, 23 Occ. N. 94, 5 O. L. R. 209.

**3. Ontario Election Act — Voting without right—Agent at poll—Reduction of penalty.**]—The defendant applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the subdivision in which he had formerly resided, and received from the returning

officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote:—*Held*, that the defendant was not liable to the penalty imposed by s. 168 of the Ontario Election Act, R. S. O. 1897 c. 9, for voting knowing that he had no right to vote. — *South Riding County of Perth*, 2 Ont. Elec. Cas. 30, followed.—2. That the defendant was not liable to the penalty imposed by s. 181 of the Act for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section, and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote.—3. That the defendant was liable to the penalty of \$400 imposed by s. 9, s.-s. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R. S. O. 1897 c. 108 should be applied, and the penalty reduced to \$40. *Smith v. Carey*, 23 Occ. N. 93, 5 O. L. R. 203.

See COMPANY, IV. 3—CRIMINAL LAW, III. 18—DISCOVERY, II. 1—JUSTICE OF THE PEACE, 3—LIQUOR ACT OF ONTARIO, 3—MUNICIPAL CORPORATIONS, I. 2, 5, IX. 3, XI. 1, XV. 2—REVENUE, 3—TRADE UNION, 1—VENDOR AND PURCHASER, 2.

## PENSION.

See INTERDICT.

## PEREMPTION.

1. **Date of last filing.**—*How determined.*—A motion for peremption will not be granted although the procedure book states that the filing of the last document took place more than two years before, if the date appearing on the document itself states the contrary. *Ross v. Phibé*, 5 Q. P. R. 254.

2. **Erroneous certificate.**—The Court will not declare a suit perempted upon the faith of a certificate which is evidently erroneous, even when it forms part of the record. *Leguerrier v. City of Montreal*, 5 Q. P. R. 440.

3. **Interruption.**—*Useful proceeding*—*Withdrawal of attorney*—*Petition to proceed in formâ pauperis.*—The withdrawal of an attorney, not authorized by a Judge, is invalid, and a proceeding made by an attorney substituted without such authorization, is not a useful proceeding having the effect of interrupting peremption.—*Quære*: Is a petition for leave to continue proceedings in formâ pauperis, a useful proceeding? *Gingras v. Syndics of Parish of St. Antoine de Longueuil*, 5 Q. P. R. 300.

4. **Notice of motion**—*Attorneys*—*Signature*—*Partnership dissolved.*—The signatures of two attorneys, being the remaining members of a legal partnership dissolved, is sufficient in a notice of motion for peremption.—2. The addition of the name of the attorney who has ceased to be a member of the partnership, does not render void the signatures of the other partners. *Cleve v. Bickerdike*, 5 Q. P. R. 391.

5. **Notice of motion**—*Service*—*Partnership*—*Solicitors.*—In an action brought by a firm of attorneys, of which one member has died since the action was begun and been replaced by another advocate, service of a notice of motion for peremption made upon the partnership as it actually exists, is valid. *Hughes v. Montreal Herald Co.*, 5 Q. P. R. 449.

6. **Old and new Codes**—*Interruption*—*Useful proceedings*—*Negotiations.*—An action begun under the old Code of Civil Procedure may be declared perempted when no useful step has been taken for two years since the coming into force of the new Code.—2. A proceeding, in order to interrupt prescription, must appear by the record or by the procedure book, and must be of such a nature as to advance the cause and aid in its continuance: mere discussions and negotiations, even in Court, to fix a day for proceeding to a hearing, which do not appear upon the record nor in the Court registers, are insufficient to stop peremption, and cannot be established by affidavits subsequent to a motion made to declare the cause perempted. *Schwob v. Town of Farnham*, Q. R. 21 S. C. 521.

7. **Several defendants.**—*Motion by one.*—One or more joint and several defendants, who have severed in their defence, may move for peremption after two years from the last proceeding as against them, although, since that time, proceedings have been had against some of their co-defendants. *Leet v. Montreal-Oregon Gold Mines Co.*, 5 Q. P. R. 174.

8. **Suspension**—*Proceeding*—*Agreement*—*Proof*—*Oral evidence.*—An

agreement between the parties, by virtue of which, at the request of the defendant, the plaintiff stayed his action in order to prosecute a claim, including that against the defendant, against a third party, is a proceeding which suspends peremption.—2. Such an agreement may be proved by witnesses in a commercial matter, and the provisions of Art. 1235 (1), C. C., which prohibits oral evidence of any acknowledgment or promise which has the effect of withdrawing a debt from the provisions of the statute relating to the prescription of actions, is not to be extended to peremption. *Hender-shot v. Macfarlane*, Q. R. 24 S. C. 5, 5 Q. P. R. 215.

See MASTER AND SERVANT, II. 1.

### PERJURY.

See CRIMINAL LAW, II. 11.

### PERPETUITY.

See WILL, II. 4, 6.

### PERSONATION.

See LIQUOR ACT OF ONTARIO, 2—MANDAMUS, 2.

### PETITION OF RIGHT.

See COSTS, VII. 4.

### PILOTS.

1. *Apprentice* — *Payment for presentation to corporation—Contract—Illegality—Recovery of money paid.* — A contract to pay a pilot for his presentation of an apprentice pilot to the corporation of pilots, is illegal and cannot be enforced.—2. Money paid on a contract null as being contrary to public order, can be recovered by an action *en répétition*. *Paquet v. Pepin dit Lachance*, Q. R. 22 S. C. 155.

2. *Forfeiture of license—Corporation of pilots—Acquiescence—Certiorari.* — A pilot who, in consequence of a temporary forfeiture of his right to exercise his trade, by the Court of Pilots, remits his commission to the Court, thereby acquiesces in the sentence and cannot afterwards proceed against the Court by way of *certiorari*. *Frenette v. Montreal Court of Pilots*, 5 Q. P. R. 415.

3. *Harbour commission—Corporation of pilots—Apprentices—Recommendation—Douceur—Illegality—Public policy.* — The statutes concerning pilots and pilotage are of public order.—2. It is the harbour commission of Quebec which commissions the pilots, and from the time that a person is commissioned as a pilot he is a member of the corporation of pilots; it is the harbour commission which prescribes the number of candidates who may be apprenticed to the corporation of pilots; it is the corporation of pilots which chooses the apprentices, who are indentured not to the individual pilots but to the corporation of pilots, whose duty it is to see that they acquire the necessary knowledge.—3. A custom exists among the pilots of Quebec of recommending, each in his turn, an apprentice, and for such recommendation each pilot requires for his personal benefit a fee from the apprentice. Without such recommendation no person is accepted as an apprentice:—*Held*, that this custom is an abuse and contrary to the public interest, and, therefore, every contract made by a pilot who recommends an apprentice, by which the latter engages himself for such recommendation to pay a sum of money to a pilot, is illegal and contrary to public order. *Raymond v. Langlois*, Q. R. 22 S. C. 392.

See SHIP, IV.

### PLANS AND SURVEYS.

*Subdivision of lot—Necessity for filing plan—Judgment—Consent of stranger.* — The owner of an immovable, situated in a town or a village, who divides it into lots, is not bound, as against those to whom he sells these lots, to deposit at the office of the Commissioner of Crown Lands and to have approved by him a plan and book of reference of the division which he has made. The only effect of default to do so is that these lots will continue to be designated according to the provisions of Art. 2168, C. C., in place of being designated by the numbers which he has given them.—2. A defendant cannot be ordered by a judgment to do something which is subject to the consent of another person. *Bergeron v. Drolet*, Q. R. 23 S. C. 415.

See CONTRACT, II. 1—EVIDENCE, I. 2—MINES AND MINERALS, 1, 2, 6—TRESPASS TO LAND, 3.

### PLEA.

See PLEADING, VII.

**PLEADING.**

- I. COUNTERCLAIM.
- II. DECLARATION.
- III. DEMURRER.
- IV. EXCEPTION.
- V. INCIDENTAL DEMAND.
- VI. NOTICE OF DEFENCE.
- VII. PLEA.
- VIII. REPLY.
- IX. STATEMENT OF CLAIM.
- X. STATEMENT OF DEFENCE.

See ACCOUNT 1 — BANKRUPTCY AND INSOLVENCY, I. 1 — BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 4, 5, 6, 20—COMPANY, IV. 3—CONTRACT, VII. 2—COPYRIGHT, 4—CROPS—DEFAMATION, I. 1, 2, 6, 7—GIFT, 6—HUSBAND AND WIFE, VIII. 3—JUDGMENT, IV. 1, 2—JUSTICE OF THE PEACE, 3—LANDLORD AND TENANT, I.—LIMITATION OF ACTIONS, II. 1, 4—MECHANICS' LIENS, I.—MUNICIPAL CORPORATIONS, I. 5, IX. 1—MUNICIPAL ELECTIONS, 3 — PARTICULARS — PARTIES — PARTITION, 1, 3 — PAUPER — SET-OFF—SPECIFIC PERFORMANCE, 2 — TRADE UNION, 2 — TRIAL, II. 3 — TRUSTS AND TRUSTEES, 1 — VENUE — WATER AND WATERCOURSES, 2—WAY, II. 2.

**I. COUNTERCLAIM.**

**Exclusion of** — Defendants to counterclaim out of jurisdiction — Foreign trade mark — Conspiracy to defraud.] — The plaintiffs, an English company, brought an action against the defendants in Ontario to restrain them from exporting goods to and interfering with their business in Australia, in breach of a certain agreement, and the defendants, besides setting up as a defence certain breaches of the agreement by the plaintiffs, counterclaimed against the plaintiffs for damages for such breaches, for a declaration of their rights as to trade with Australia and other countries, and a rectification of the agreement to make it conform to the representations of the plaintiffs. The defendants also counterclaimed against the plaintiffs, and G. and P., two persons not originally parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trade marks they were entitled to in Australia under the agreement by the plaintiffs, assigning the trade marks to G. and P., who, with the Australian

company, fraudulently put in force the trade mark laws of Australia, and prevented the defendants exporting their goods to Australia and obscured them in their business:—*Held*, that the claims made in the counterclaim against the plaintiffs alone, were proper subjects of a counterclaim in the action; but that there was no such intimate connection between the subject of the action and the subject of the counterclaim against the four parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action. *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*. [1897] 2 Ch. 487, followed. *Dunlop Pneumatic Tire Co. v. Ryckman*, 23 Occ. N. 106, 5 O. L. R. 249.

See COSTS, VIII. 2—SALE OF GOODS, III. 3.

**II. DECLARATION.**

**1. Irrelevant allegations**—*Action by physician for fees—Cause of injury to defendant.*]—A physician who sues for the value of professional services, may not allege in his declaration, even in order to justify the amount of his claim, that the injury from which his patient suffered was mentioned in the newspapers, as well as the fact that the services of the plaintiff had been engaged; that the injury was caused by the son of the defendant, who was at the time in custody accused of injuring the defendant. *Marien v. Lussier*, 5 Q. P. R. 324.

**2. Necessity for plaintiff's signature**—*Fraudulent deeds—Inscription en faux.*]—A plaintiff who begins a suit demanding that certain deeds mentioned in the declaration shall be declared fraudulent, is not obliged himself to sign the declaration, although he indicates in the declaration that he intends to inscribe *en faux* against such deeds. *Marcopostolon v. Fourieas*, 5 Q. P. R. 315.

**3. Puis darrein continuance**—*Aggravation of damages.*]—A plaintiff who complains of injuries caused to him a long time before the institution of the action, cannot, by a proceeding *puis darrein continuance*, on the eve of the hearing, allege facts which would amount to an aggravation of damages. *Brunet v. Canadian Pacific R. W. Co.*, 5 Q. P. R. 425.

See post VIII. 3.

See also WRIT OF SUMMONS, II. 4.

## III. DEMURRER.

**Grounds specified — Revivor—Executors—Res judicata.]**—In adjudicating upon an inscription in law the Court will only take into consideration the grounds which are there specified.—2. A judgment rendered in an action *qui tam* may be set up by the defendants (executors) in an action brought for the purpose of forcing them to revive an action for damages, when the question in litigation is the same in the two cases. *Marshall v. MacDougall*, 5 Q. P. R. 186.

See HUSBAND AND WIFE, II. 2—SPECIFIC PERFORMANCE, 2.

## IV. EXCEPTION.

**1. Dilatory exception — Account—Default of service.]**—Default of service of an account upon which the action is based is ground for a dilatory exception, and not for an exception to the form. *Dubrule v. Leclaire*, 5 Q. P. R. 310.

**2. Dilatory exception—Contractor—Warranty.]**—The owner of a property, being sued for a fault of his contractor, is entitled to bring in the latter *en garantie* by a dilatory exception. *Flanigan v. Town of Outremont*, 6 Q. P. R. 22.

**3. Dilatory exception — Inconsistent allegations—Motion to compel election—Deposit.]**—A motion to compel a defendant to elect between two allegations of his defence is in the nature of a dilatory exception, and must be accompanied by a deposit. *Martineau v. Pauzé*, 5 Q. P. R. 412.

**4. Exception to the form — Loss after filing—Record—Copy.]**—An exception to the form, accompanied by the deposit required in similar cases filed at the office of the Court within the time fixed by law, is regularly upon the record, and, therefore, before the Court, and if, in the time which elapses between its filing in the office and the day of its presentation before the Court, the original exception to the form is lost without any fault on the part of the party who filed it, the Court will order the filing, as part of the record, of a copy of such exception in place of the original. *Bélanger v. Mercier*, Q. R. 12 K. B. 428.

**5. Exception to the form—Notice of deposit.]**—The Court will not hear an exception to the form when no notice of the deposit made therewith has been given to the opposite party. *Merchants Bank of Canada v. Republic Consolidated Gold Mining Co.*, 5 Q. P. R. 202.

**6. Exception to the form—Residence of defendant.]**—An exception to the form alleging that the defendant is described as being of the village of St. Louis, whereas he resides at Montreal, where process in the action has been served upon him, will be dismissed with costs. *Brunet v. Tison*, 5 O. P. R. 459.

**7. Exception to the form—Summary procedure — Time — Waiver.]**—A defendant sued in tort under the Summary Procedure Act, may proceed by way of exception to the form within the time limited, and if he has pleaded to the merits he cannot complain of the defect of form at the time of the setting down of the cause for hearing. *Levy v. Strathcona Rubber Co.*, 5 Q. P. R. 341.

**8. Preliminary exception — Deposit.]**—The requirements of Art. 165, C. P., as regards the deposit to be made with preliminary exceptions, are peremptory, and must be strictly complied with. *Leclère v. Ayer*, 5 Q. P. R. 253.

**9. Preliminary exception—Plea to the merits — Postponement.]**—To a demand for an assignment the debtor filed an exception and contested the demand upon the merits before adjudication upon the exception:—*Held*, that it is lawful for a party who had filed a preliminary exception to plead to the merits before the contention upon the exception is decided; but in this case the hearing upon the merits should be postponed until the exception should be decided, and if it should be maintained, the defendant would have no right to costs of the contestation; if the exception should be dismissed, the contestation would proceed in the ordinary way. A motion to set aside the contestation was dismissed. *McCall v. Godmaire*, 5 Q. P. R. 210.

**10. Preliminary exception—Time—Computation—Vacation.]**—Although Art. 10, C. P., says that "in the computation of the time for pleading or for trial the first day of September is considered to be the day immediately following the 30th day of June," it does not follow that every day after the 30th June is to be considered as being the 1st September, and, therefore, the three days allowed by Art. 164, C. P., for the service of preliminary exceptions begins to run, in the case of an action brought during vacation, upon the first and not the second day of September. *Barbeau v. Jobin*, 5 Q. P. R. 457.

See BANKRUPTCY AND INSOLVENCY, I. 4—CHURCH, 1—COSTS, VII. 9—DISTRIBUTION OF ESTATES, 4—EXECUTION, II. 9—HUSBAND AND WIFE, II. 2, VI. 2—

INFANT, 7—JUDGMENT, II. 3, 4—LANDLORD AND TENANT, III. 9—PARTIES, 6—PROHIBITION — WRIT OF SUMMONS, I. 1, 6.

#### \*V. INCIDENTAL DEMAND.

**Filing—Amendment.]**—An incidental demand whereby a plaintiff claims something which he had omitted to ask for by his action, is not in the nature of an amendment, and leave to file it is not necessary. *Scottish Union Assurance Co. v. Quinn*, 5 Q. P. R. 262.

See DEFAMATION, II. 2.

#### VI. NOTICE OF DEFENCE.

**County Courts—Striking out.]**—In an action in a County Court the fact that the special matters set out in a notice of defence could be given in evidence under the general issue, is not necessarily a good ground for an application to strike the notice out. *Bennett v. Cody*, 35 N. B. Reps. 277.

#### VII. PLEA.

**1. Contentions in law—Principal and agent.]**—In the Quebec system of procedure, the Courts having to adjudicate upon both fact and law, contentions of law are allowable in pleadings.—2. The allegations in a defence that the defendant has acted not personally but as mandatary of a third person, whom he names, are pertinent; the mandatary who acts in his own name within the limits of his authority, binding his principal as well as himself. *Dubois v. Gohier*, 5 Q. P. R. 228.

**2. County Court—Action against administrator.]**—Where the defendant, being sued in the County Court as an administrator, pleaded that the intestate was never indebted, and for a second plea, *plene administrant*, the Court ordered the second plea to be struck out, on the ground that more than one plea can only be pleaded by leave of the Court. *Belyea v. Hatfield*, 23 Occ. N. 158.

**3. Default—Leave to file—Regularity—Order—Appeal from—Time.]**—A party in default for the filing of a pleading in the matter of the contestation of a demand for an assignment, may obtain from a Judge leave to file such pleading, and if such permission is granted the filing will be regular.—2. An order permitting the filing of a pleading after the proper time, obtained *ex parte*, is a judg-

ment, and the party complaining of such judgment must in proceeding to have it reviewed do so within the proper time. *Filion v. Mussen*, 5 Q. P. R. 284.

**4. Inconsistent pleas—Denial—Payment—Set-off.]**—A defendant may plead at the same time that the debt sued for never existed and that it has been extinguished by payment or set-off. *Lemoine v. Caisse Generale*, Q. R. 23 S. C. 390.

**5. Municipal by-law—Invalidity—Advice of solicitor.]**—It is not lawful to plead in attacking the validity of a municipal by-law relied on by the plaintiff, that it was passed contrary to the opinion of the advocate of the municipality. *Town of Westmount v. McKim*, 5 Q. P. R. 134.

**6. P<sub>u</sub>is darrein continuance—Facts arising since action—Affidavit—Documents—Judgment.]**—The facts contained in a plea or a reply *p<sub>u</sub>is darrein continuance* must have arisen since the contestation.—2. Such a plea or reply must be accompanied by an affidavit attesting the facts and allegations, unless these facts are stated by an authentic document.—3. A certified copy of a judgment proves its contents, but does not by itself prove the relation which exists between the adjudication and the facts which are set up in the proceeding in which it is delivered. *McDonough v. Catholic Institution of Deaf Mutes*, 5 Q. P. R. 436.

**7. Submission of rights—Law stamps.]**—A declaration of a defendant that he submits his rights to the Court, especially if accompanied by documents in support of it, is a pleading, and will be set aside if it is not stamped as such. *Dagenais v. Desnoyers*, 5 Q. P. R. 384.

#### VIII. REPLY.

**1. Consideration—Departure.]**—A party who sues on a writing alleged to have been given in execution of a natural obligation, cannot, in reply to a plea of no consideration, set out a wholly distinct and additional consideration; and the paragraphs of his reply relating thereto will be rejected on motion. *Brulé v. Brulé*, 5 Q. P. R. 263.

**2. Contract—Lease or sale—Amplification of plea.]**—If a party, in his plea, calls a certain contract a lease, and the plaintiff, as his answer, sets up that it is a sale, the defendant may, in his replication, allege that it is immaterial whether the writing is interpreted as a lease or as a sale.—2. A replication can-

not set up in detail allegations already set up in a plea; such allegations being either useless or irregularly pleaded in a replication. *Migneron v. Williams Manufacturing Co.*, 5 Q. P. R. 226.

### 3. Departure from declaration.]

—A plaintiff cannot, by a special reply, remodel, complete, or modify his declaration. *Walker v. Lamoureux*, Q. R. 21 S. C. 492.

**4. Leave to deliver — Time — Jury notice—Discretion—Notice of trial—Close of pleadings.]**—Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury. —The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue; and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand. —Rules 257, 258, 262, considered. *Qua v. Canadian Order of Woodmen of the World*, 23 Occ. N. 51, 5 O. L. R. 51.

See MASTER AND SERVANT, II. 2.

## IX. STATEMENT OF CLAIM.

**1. Amendment—Conversion—Prayer for relief—Payment into Court—Judgment—Costs—Appeal.]**—The judgment in 4 Terr. L. R. 498 varied by striking out the order to amend the plaintiffs' statement of claim as unnecessary, and directing that judgment be entered for the defendant, and that the amount paid into Court by the defendant be paid out to the plaintiffs; the plaintiffs to have the costs of the action up to the time of the second payment into Court, the defendants to have the general costs of the action after that date, and the plaintiffs to have the costs of the issues upon which they succeeded.—The trial Judge having reserved judgment came to the conclusion that the plaintiffs were entitled to the

moneys paid into Court by the defendant. He held, however, that they were not so entitled under the form of the statement of claim (4 Terr. L. R. p. 498), but only under a claim for conversion, and accordingly in his reasons for judgment—the formal order had not been taken out before the appeal—he stated that under the authority of Rule 189 of the Judicature Ordinance, C. O. 1898 c. 21, he “amended the statement of claim so as to determine the real question at issue according to the evidence adduced,” and thereupon directed judgment to be entered for the plaintiffs for the amount paid into Court, without costs:—*Held*, that no amendment was necessary; that if, as in this case, the facts alleged shewed a wrongful conversion, that was sufficient, although the specific words were not used, and that, so far as the relief claimed was concerned, the Court was entitled under English O. 20, rule 6 (introduced by J. O., 1898, s. 21), and J. O., 1898, s. 8, s.s. 5, to give, and ought to give, any appropriate relief to which the plaintiffs were entitled, though it was not specifically claimed. — 2. That where money is paid into Court (though with a denial of liability) it is to be taken to be pleaded as an alternative defence going to the whole cause of action, and if the plaintiff fails to shew himself entitled to a greater sum the defendant is entitled to judgment on this defence, and that the proper judgment as to costs is:—The plaintiff to have the costs of the action up to the time of payment into Court; the defendant to have the general costs of the action from that time, and the plaintiff to have the costs of the issues found in his favour. — 3. That although by Rule 500 of the J. O., C. O. 1898 c. 21, no appeal lies without leave from any judgment or order as to costs only which by law are left to the discretion of the Court or Judge making the judgment or order, and although the Court will not as a rule interfere with such discretion unless it has been exercised on a wrongful principle, nevertheless when the judgment or order dealing with the question of costs is appealed from on other grounds, the Court has power under Rule 507 to make any order which ought to have been made by the Court or Judge, and this Rule authorizes the Court *in banco* to deal with the question of the costs below in any way which may appear necessary or expedient by reason of its varying or reversing the judgment or order appealed from. *Imperial Bank v. Hull*, 5 Terr. L. R. 313.

**2. Amendment—Delivery of amended statement—Irregularity—Time—Validating order — Terms — Costs—Stay of**

*proceedings—Appeal—Waiver — Compliance with terms.*]—After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim:—*Held*, that the delivery of the amended statement of claim was irregular under Rule 300.—An order was made, upon the defendant's application to set aside the amended statement of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or, if such costs should not be paid within one month after taxation, that the amendments should be struck out.—Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order.—*Anlaby v. Praetorius*, 20 Q. B. D. 764, *Hewson v. Macdonald*, 32 C. P. 407, and *Duffy v. Donovan*, 14 P. R. 159, followed. *Anthony v. Blain*, 23 Occ. N. 50, 5 O. L. R. 48.

**3. Amendment—Exceeding terms of order allowing — Waiver of right to object.**]—Two weeks after the receipt of an amended statement of claim the defendants' solicitors wrote to the plaintiffs' solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out the amended statement of claim, on the ground that it exceeded the terms of the order authorizing amendment:—*Held*, that the defendants had waived their right to object. *Centre Star Mining Co. v. Rossland Miners' Union*, 23 Occ. N. 57, 9 Brit. Col. L. R. 325.

## X. STATEMENT OF DEFENCE.

**1. Embarrassment—Action against trade union—Defence of nul tiel corporation—Application to strike out pleadings.**]—In an action against a labour union for damages in respect of the Rossland strike in 1901, the union pleaded that "they were not a company, corporation, co-partnership, or person, and not capable of being sued in this or any action:—"*Held*, plea bad.—The defendants in their pleading also claimed the benefit

of the provisions of the Trade Unions Amendment Act of 1902, and the plaintiffs applied to have the plea struck out, on the ground that it was embarrassing, as the Act was not retroactive:—*Held*, that questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing.—It is open to either party to an action up to the time of the trial to attack on other's pleadings. *Centre Star Mining Co. v. Rossland Miners' Union*, 23 Occ. N. 272.

**2. Embarrassment—Striking out.**]—Questions of substantial difficulty or importance raised by the statement of defence should not be disposed of on motion in Chambers, under Rule 318 of the King's Bench Act, 1895, to strike out paragraphs of the statement of defence as embarrassing, but should be left to be dealt with at the trial of the action.—The defences herein were held to present questions of such substantial difficulty and importance that they should not be struck out on motion in Chambers.—*Etna Life Ins Co. v. Sharp*, 11 Man. L. R. 141, discussed and explained. *Long v. Barnes*, 14 Man. L. R. 427.

**3. Embarrassment—Striking out—Partnership—Bills of sale.**]—Matter in a statement of defence, attacked as tending to prejudice, embarrass, or delay, will be struck out less freely than in a statement of claim.—*McEwen v. North-West Coal and Navigation Co.*, 1 Terr. L. R. 203, followed.—Statement of claim set up a partnership between the plaintiff D. and the defendant P., a mortgage by D. and P. of partnership goods to C., and a mortgage of P.'s interest therein to C. Bros.—The 1st paragraph of the defence of C. Bros. denied the partnership.—The 2nd paragraph set up that, "whatever relationship existed" between D. and P., that relationship was put an end to and the entire ownership of the goods mortgaged then vested in D. free from any interest of P.:—*Held*, that the 2nd paragraph was embarrassing, inasmuch as, while it assumed some relationship to have existed between D. and P., and alleged it to have been put an end to and the property to have vested in D., it did not allege (1) the nature of the relationship, and (2) the mode in which the relationship had been terminated and the property become vested in D., i.e., whether by operation or implication of law or by agreement of dissolution or other agreement stating the nature of such other agreement.—The 7th paragraph of the defence of C. Bros. alleged that, even if the mortgage to C. constituted a partnership liability, C. Bros. had a separate claim against D. before C. acquired any such partnership liability:—*Held*, that



the 7th paragraph was embarrassing, inasmuch as it did not allege that the separate claim of C. Bros. was the same as that for which they held the chattel mortgage, and as, if that was not the case, the whole paragraph was entirely immaterial.—The 8th paragraph of the defence alleged that the mortgage to C. was void, and did not comply with the Bills of Sale Ordinance, and no affidavit of *bona fides* accompanied it:—*Held*, that the 8th paragraph was embarrassing, inasmuch as it was uncertain whether it intended that the mortgage was void on the ground only of the absence of an affidavit of *bona fides*, or as well for non-compliance with other requirements of the Bills of Sale Ordinance, or on grounds apart from that Ordinance. *Davis v. Patrick*, 2 Terr. L. R. 9.

4. **Time for**—*Noting for default*—*Security for costs*—*Payment into Court*—*Notice of*.]—Where a plaintiff, having complied with an order for security for costs by paying money into Court, gives notice thereof, as required by Con. Rule 1207, the defendant is entitled to at least one day to ascertain if payment has really been made, and to file his defence, before the plaintiff can note the pleadings closed for default of defence—the order for security for costs having stayed the proceedings the day before the last day for delivering the defence. *Northern Elevator Co. v. North-West Transportation Co.*, 6 O. L. R. 23.

### PLEDGE.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 14—**FRAUDULENT CONVEYANCE**, 3—**FRAUDULENT PREFERENCE**, 2.

### POLICE MAGISTRATE.

See **MANDAMUS**, 2.

### POLICE OFFICERS.

See **MUNICIPAL CORPORATIONS**, XII.—**NOTICE OF ACTION**, 3.

### POSTMASTER.

See **CROWN**, IV. 3.

### POSTPONEMENT OF TRIAL.

See **TRIAL**, V.

### POUNDAGE.

See **SHERIFF**, 5.

### POWER OF ATTORNEY.

See **COMPANY**, IV. 2—**PARTNERSHIP**, 4—**PROCURATION**.

### PRACTICE.

See **ACCOUNT**—**ACTION**—**APPEAL**—**ARBITRATION AND AWARD**, 2, 4, 5, 6, 7—**ARREST**—**ASSAULT**—**ATTACHMENT OF DEBTS**—**ATTACHMENT OF GOODS**—**BANKRUPTCY AND INSOLVENCY**, I.—**BANKS AND BANKING**, 4—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2, 3, 4, 5, 6, 7, 12—**CANADA TEMPERANCE ACT**—**CERTIORARI**—**COMPANY**, III., IV. 3—**CONSOLIDATION OF ACTIONS**—**CONTEMPT OF COURT**—**CONTRACT**, V., VII. 2—**COPYRIGHT**, 3, 4—**COSTS**—**COURTS**—**CRIMINAL LAW**—**CROPS**—**DAMAGES**—**DEED**, 4—**DEFAMATION**, I. 1, 2, 3, 6, 7, II. 1, 2—**DESISTMENT**—**DISCOVERY**—**DISTRIBUTION OF ESTATES**, 1, 2, 4, 6, 7, 8—**EVIDENCE**—**EXECUTION**—**EXECUTORS AND ADMINISTRATORS**, 1, 7—**EXHIBITS**—**FRAUDULENT CONVEYANCE**, 2—**FRAUDULENT PREFERENCE**, 1—**GIFT**, 6, 8—**HUSBAND AND WIFE**—**INFANT**—**INJUNCTION**—**INTERDICT**—**INTEREST**, 3—**JUDGMENT**—**JUDGMENT DEBTOR**—**JUSTICE OF THE PEACE**, 3, 4—**LANDLORD AND TENANT**, I. 1, III. 1, 9, 12, 14, IV. 1, V. 2, VI. 1—**LIMITATION OF ACTIONS**, II. 4—**LIS PENDENS**—**LUNATIC**—**MANDAMUS**—**MASTER AND SERVANT**, II. 1, 2, 8, III. 3—**MECHANICS' LIENS**, 1, 3—**MINES AND MINERALS**, 1, 2, 5—**MORTGAGE**, 1, 2—**MUNICIPAL CORPORATIONS**, I. 1, 5, 6, IX. 1, 3, 4, 5, XVI. 1, 2—**MUNICIPAL ELECTIONS**, 1, 2, 3, 4—**NEW TRIAL**—**NOTICE OF ACTION**—**NOTICE OF INSCRIPTION**—**OATHS**—**OPPOSITION**—**PARLIAMENTARY ELECTIONS**, II.—**PARTICULARS**—**PARTIES**—**PARTITION**, 1, 3, 4—**PARTNERSHIP**, 4—**PATENT FOR INVENTION**, 3—**PEREMPTION**—**PLEADING**—**PRIVY COUNCIL**—**PROCURATION**—**PROHIBITION**—**RECEIVER**—**REFEREES AND REFERENCES**—**REPLEVIN**—**SALE OF GOODS**, VI. 3—**SET-OFF**—**SHERIFF**, 2, 3, 4, 5—**SHIP**, III. 2—**SOLICITOR**—**SPECIFIC PERFORMANCE**, 2, 3—**STAY OF PROCEEDINGS**—**TENDER**—**TRADE UNION**, 2—**TRIAL**—**TRUSTS AND TRUSTEES**, 1—**VENDOR AND PURCHASER**, 8—**VENUE**—**WAY**, I. 2—**WRIT OF SUMMONS**.

**PREFERENCE.**

See **BANKRUPTCY AND INSOLVENCY, V.—FRAUDULENT PREFERENCE.**

**PRESCRIPTION.**

See **ASSESSMENT AND TAXES, II. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 15, 16, 17—COPYRIGHT, 3—CROWN, I. 1, III. 5—DEFAMATION, I. 2—MUNICIPAL CORPORATIONS, VI. 2—PEREMPTION—RAILWAY, VII. 1—TRESPASS TO LAND, 4—WATER AND WATERCOURSES, 1, 5—WAY, II. 2.**

**PRESSURE.**

See **BANKRUPTCY AND INSOLVENCY, 1, 2, 3—FRAUDULENT CONVEYANCE, 4.**

**PRINCIPAL AND AGENT.**

**1. Auctioneer — Sale of property — Concealment of material fact—Action of deceit — Depriving of commission.]—**An action of deceit will lie against an auctioneer who, being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts.—Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected. *Ring v. Potts*, 36 N. B. Reps. 42.

**2. Insurance agent — Agreement to give notice of further insurance—Omission—Liability—Gratuitous undertaking —Mandate.]—**The defendant, a general insurance agent, undertook gratuitously to have an additional \$500 policy placed on the property of the plaintiffs; and, before completion of this transaction, he also undertook, at the plaintiffs' request, to notify the companies already holding policies, of the additional insurance, as was required under their policies. A loss occurred, and, owing to the defendant having failed to give such notice, the plaintiffs were placed in the power of the insurance companies and had to accept \$1,000 less than they otherwise would have received:—*Held*, that the transaction was one of mandate. If the defendant had not entered upon the execution of the business intrusted to him, he

would have incurred no liability, but, having undertaken to perform a voluntary act, he was liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs: *Coggs v. Bernard*, 1 Sm. L. C. 182.—Judgment of LOUNT, J., 4 O. L. R. 541, 22 Occ. N. 372, affirmed. *Baxter v. Jones*, 23 Occ. N. 258, 6 O. L. R. 360.

**3. Insurance agent—Breach of duty —Neglect to insure—Damages—Amendment.]—**The defendant, who was the agent of a fire insurance company, was applied to by the plaintiff for an insurance upon certain buildings. The defendant filled out a form of application, which was signed by the plaintiff's uncle and guardian, and received the premium, but neglected to insure. The buildings having been burnt, the plaintiff was held by the trial Judge entitled to recover their value as damages. But his decision was reversed by the full Court, which held that the plaintiff's case was not proved; that at most it was proved that the defendant was to forward the application to a loan company, the holders of a mortgage on the premises in question, and that the company were to be expected to apply for the insurance; and an amendment to make that case was refused. *Henry v. Beattie*, 23 Occ. N. 30, 250.

**4. Mandate — Revocation—Notice—Indemnity—Admission—Offer of settlement.]—**An agreement between the parties, by which the defendants were to pay the plaintiff a fixed sum per month for receiving, storing, handling, and shipping such goods as might be consigned to him for and on account of the defendants, is a contract of mandate; and such contract may be revoked, without notice, at any time by the mandator, whether the mandatary is salaried or unsalaried, subject to his right to be indemnified against all loss directly flowing from the mandator's wrongful act, where he has acted wrongfully or unjustly in revoking the mandate,—which was not proved in the present case.—2. The plaintiff cannot avail himself of an offer contained in a proposition of settlement made by the defendant (but which he, the plaintiff, refused to accept), as a recognition or admission of his demand to that extent. *Galibert v. Atteaus*, Q. R. 23 S. C. 427.

**5. Promissory notes—Authority of agent—Husband acting for wife.]—**Where a wife separated as to property is carrying on business as a trader, and the husband is acting as her manager under a general power of attorney, the wife is liable to bond *fide* holders, for value,

of negotiable instruments signed or indorsed by the husband for the purposes of such business, and particularly where there is no pretension that the husband appropriated to his own use any part of the funds obtained on such negotiable instruments. *Quebec Bank v. Jacobs*, Q. R. 23 S. C. 167.

**6. Purchase of goods—Purchase in agent's name—Insolvency of agent—Claim by curator.]**—Goods bought by an agent for his principals, for which he was to be paid a commission, are the property of the principals even when bought in the name of the agent. *In re Lemelin*, Q. R. 22 S. C. 87.

**7. Sale of land—Exclusive right of sale—Commission—Contract.]**—In order to vest a real estate agent with the exclusive right of sale of an immovable, and entitle him to a commission, there must be a contract in writing, or, at least, an equivalent admission on the part of the owner, of the existence of a contract. The mere statement of a price which the owner is willing to take, and of a commission which he is willing to pay, does not constitute such a contract. *Mainwaring v. Crane*, Q. R. 22 S. C. 67.

**8. Sale of land—Agreement for commission—Forfeited deposit—Right of agent to expenses—Commission on deposit.]**—*Grace v. Hart*, 23 Occ. N. 239.

**9. Sale of land—Commission—Secret bargain between purchaser and agent of vendor.]**—F., an agent of the defendant company, agreed with the plaintiff that he would withhold 18,000 acres of the company's lands from sale for 16 days to give the plaintiff an opportunity to complete negotiations for the sale of the land, and promised that if he sold the land he should receive a commission of 2½ per cent.—The plaintiff afterwards entered into negotiations with one G., who represented a number of investors desiring to purchase a large quantity of land, but G. was not prepared to bind himself at once and wanted time to make financial arrangements and at the same time to have the opportunity kept open, and agreed to pay the plaintiff \$500 if he would give him the desired time. The plaintiff then agreed to and did give the time and reported to F. that he had done so, but did not inform F. that he expected to be paid for it. The plaintiff never received the \$500. nor any part of it, and G. and his associates carried out the purchase of 18,400 acres of the company's lands at the price agreed on:—*Held*, that, although the secret bargain was a breach of the plaintiff's duty to the defendants, and, if the money had been received, the plaintiff would have to ac-

count for it to them, yet it was not such as to disentitle the plaintiff to the stipulated commission for the service which he had fully performed. *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339, and *Culverwell v. Birney*, 11 O. R. 265, followed. *Davidson v. Manitoba and North-West Land Corporation*, 22 Occ. N. 305, 23 Occ. N. 26, 14 Man. L. R. 232.

**10. Sale of mine—Remuneration of agent—Written agreement for commission—Oral promise of expenses and remuneration if no sale—Findings of jury.]**—The defendant gave instructions in writing to the plaintiff respecting the sale of a coal mine on terms mentioned, and agreed to pay a commission of 5 per cent. on the selling price, to include all expenses. The plaintiff failed to effect a sale. He brought an action to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration. The jury found that the plaintiff was entitled to compensation of \$9,667.62, and also answered questions as follows:—(1) Did the defendant in the middle of 1890 verbally authorize the plaintiff to do his best to sell her mine, and if so, was any compensation mentioned at the time? (a) In view of concessions made subsequently, we believe there was. (b) A promise of fair treatment in case of no sale. (2) Were the documents signed later intended to represent all the terms? Yes, had sale been effected. (3) If the documents were not so intended, what agreement was come to? Answer to question (1) expresses our view:—*Held*, that judgment was properly entered for the plaintiff on these findings; that the agreement as found by the jury was not illusory; that the findings supported the judgment; and that the verdict was not one which the jury could not reasonably find. *Harris v. Dunsmuir*, 9 Brit. Col. L. R. 303.

See ASSESSMENT AND TAXES, VI. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 9. 13—CARRIERS, 3—COMPANY, IV. 3—CONTRACT, IV. 1, VIII. 2—CONVERSION—COURTS, IX. 8—GIFT, 9—MUNICIPAL CORPORATIONS, III. 1—PARLIAMENTARY ELECTIONS, I.—PARTIES, 5—PLEADING, VII. 1—SPECIFIC PERFORMANCE, 1.

## PRINCIPAL AND SURETY.

**1. Guaranty—Construction—Continuing security.]**—A firm, being indebted to the plaintiffs for goods supplied, on ordering further goods received from the plaintiffs a telegram—"Let M. L." (defendant) "wire guaranty for payment of all accounts to us, and everything will be

satisfactory." The defendant, without apparently having seen the telegram, but having been informed of its contents, telegraphed in reply, "Will guarantee payment of all accounts" for the firm:—*Held*, that the guaranty was a continuing one, and the defendant was liable for accounts incurred or to be incurred. *St. Laurence Steel and Wire Co. v. Leys*, 6 O. L. R. 235.

**2. Judgment against principal—*Res judicata*—Appropriation of payments—*Notice to surety*—*Joint action*.]**—A judgment against the principal debtor is *res judicata* as to the surety.—2. When the agent of an insurance company, owing the company for premiums which he has received, remits money to the company without saying to what premiums he intends the money to be applied, they must be appropriated to the premiums which he has been owing longest. Such appropriation may be set up against the sureties of the agent as well as against himself.—3. A suit against the principal debtor in sufficiently brought to the knowledge of the surety to render him liable for costs incurred after the entry of the action, including the costs of the contestation of the action by the principal debtor, if the surety has been sued jointly with the principal. The effect of the knowledge which results from such suit, remains if the creditor desists from his action against the surety. *Hetherington v. Western Assurance Co.*, Q. R. 24 S. C. 88.

**3. Release of surety—Assignment of mortgage—Covenant—Discharge of part of land.**—The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt:—*Held*, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not. *Farmers' Loan and Savings Co. v. Patchett*, 23 Occ. N. 285, 0 O. L. R. 255.

**4. Release of surety—Rent—Rescission of lease—Damages.**—A third person who was given security for the payment of rent by a tenant is discharged when the lease is rescinded at the request of the landlord upon a ground other than non-payment of rent, and, the effect of the rescission operating on the day of the institution of the action for rescission, the landlord cannot claim from the surety gales of rent falling due after that date, even when these gales are included

in the damages which the tenant has been ordered to pay by reason of the rescission. *Burland v. Valiquette*, Q. R. 24 S. C. 94.

## PRIORITIES.

See COMPANY, III. 6—EXECUTION, IV. 6—FIXTURES, 2—FRAUDULENT CONVEYANCE, 4—INDIAN LANDS—REGISTRY LAWS, 1, 2.

## PRIVATE PROSECUTOR.

See CRIMINAL LAW, III. 10.

## PRIVILEGE.

See ARREST, I.—CONSTITUTIONAL LAW, 3—CRIMINAL LAW, I. 1—DEFAMATION, I. 8, 10—LIEN—MECHANICS' LIENS—MINES AND MINERALS, 1—WILL, III. 2.

## PRIVY COUNCIL.

**1. Leave to appeal—Mines—Constitutional question—Cross-appeal without notice—Consolidation—Security—Cost of printing record.**—The suppliants obtained leave to appeal from the judgment of the Supreme Court of Canada, 23 Occ. N. 34, 32 S. C. R. 586, dismissing three petitions of right, and in part reversing the judgment in 7 Ex. C. R. 414. The Board also granted the Crown leave to cross-appeal, and directed that the Supreme Court record should be accepted; that the three cases should be consolidated; that the security deposit should be £100 in each case; that each side should bear one-half the cost of transcribing and printing the Privy Council record; and that the appeal and cross-appeal should be heard together, upon one printed case lodged on each side. *Chappelle v. The King*, *Cormack v. The King*, *Twiced v. The King*, 23 Occ. N. 163.

**2. Leave to appeal—Rescission—Petition.**—See *Ontario Mining Co. v. Seybold*, [1903] A. C. 73.

## PROCEDURE.

See CRIMINAL LAW, III.

**PROCURATION.**

**Foreign plaintiff—Advocate—Other person.]**—The procuration which a foreign plaintiff must give, need not necessarily be given to an advocate, and it is sufficient if it is given to some person resident at the place where the action is brought. *Spencer v. Strathcona Rubber Co.*, 5 Q. P. R. 385.

**PRODUCTION OF DOCUMENTS.**

See DISCOVERY, II.

**PROHIBITION.**

**Court of Commissioners—Territorial jurisdiction—Declinatory exception—Judgment—Desistment.]**—Article 170, C. P., is not limitative, and applies to all cases analogous to those expressly mentioned in the Article.—2. In this case a writ of prohibition having been issued to quash a judgment of the Court of Commissioners of a district other than that in which the writ of prohibition was issued, a declinatory exception filed against the writ of prohibition, accompanied by a desistment from the judgment sought to be quashed, was maintained, and the action dismissed. Judgment in Q. R. 21 S. C. 437 reversed. *Gaudet v. Garneau*, Q. R. 12 K. B. 145.

See COURTS, V. 1—LANDLORD AND TENANT, V. 2.

**PROMISSORY NOTE.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

**PROSECUTOR.**

See MANDAMUS, 2.

**PROTESTANT SCHOOL.**

See SCHOOLS, 1.

**PROTHONOTARY.**

See BANKRUPTCY AND INSOLVENCY, I. 5—COURTS, IX. 9—DESISTMENT, 1—DISTRIBUTION OF ESTATES, 7.

**PROVIDENT SOCIETY.**

See MASTER AND SERVANT, II. 1.

**PROVINCES.**

See CONSTITUTIONAL LAW, 4—INTEREST, 2.

**PROVINCIAL TREASURER.**

See COMPANY, IV. 3.

**PUBLIC HEALTH.**

**1. Prosecution — Ratepayer — Disinfection—Public Health Act.]**—A prosecution for the infringement of by-laws of the board of health can be brought by any ratepayer, without any authorization.—2. A private disinfection of infected premises by the proprietor is not sufficient reason, under the Public Health Act, for refusing to allow the executive officer to disinfect. *Bousquet v. Gagnon*, Q. R. 23 S. C. 35.

**2. Vaccination — Municipal by-law —Unreasonableness.]**—A by-law holding the manager or head of a business establishment liable, under pain of fine or imprisonment, for allowing an employee to frequent any manufacturing or business establishment, without furnishing a certificate shewing that he has been vaccinated, is not reasonable but oppressive, and is therefore illegal. *City of Montreal v. Garon*, Q. R. 23 S. C. 363.

See MUNICIPAL CORPORATIONS, XIII.

**PUBLIC LIBRARIES.**

See MUNICIPAL CORPORATIONS, XIV.

**PUBLIC OFFICERS.**

See NOTICE OF ACTION.

**PUBLIC POLICY.**

See GIFT, 9—PILOTS, 3.

**PUBLIC SCHOOLS.**

See SCHOOLS.

**PUBLIC WORKS.**

See CROWN, III.

**PUIS DARREIN CONTINUANCE.**

See PLEADING, II. 3, VII. 6.

**QUANTUM MERUIT.**

See CONTRACT, VIII. 4—MASTER AND SERVANT, III. 4—SOLICITOR, 6.

**QUARANTINE.**

See MUNICIPAL CORPORATIONS, XIII. 1.

**QUO WARRANTO.**

See MUNICIPAL ELECTIONS.

**RAILWAY.**

- I. BONDS.
- II. CARRIAGE OF GOODS.
- III. FARM CROSSINGS.
- IV. FENCES.
- V. HIGHWAY CROSSINGS.
- VI. INJURY TO PERSONS.
- VII. LANDS.
- VIII. OTHER CASES.

See ALIENS—ASSESSMENT AND TAXES, IV. 1—CONSTITUTIONAL LAW, 6—DISCOVERY, I. 7—EXECUTION, II. 10—LANDLORD AND TENANT, III. 6—MASTER AND SERVANT, II. 1, 2, 3, 9, 10, 15—MUNICIPAL CORPORATIONS, XVI. 7—NUISANCE, 4—WAY, I. 1.

**I. BONDS.**

**1. Mortgage—Default in payment—Sale—Consent judgment.**—The railway of a company incorporated by Provincial legislation, afterwards declared to be a work for "the general advantage of Canada," can be validly sold as a going concern, under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding. Bonds of the railway company were issued, and as security for their payment a mortgage of the railway was made to a trust

company, containing a provision that on default in payment of the principal of the bonds, and on request of three-fourths of the bondholders, the trustees should immediately elect and declare the bonds to be due and payable, and take proceedings for enforcing payment:—*Held*, that 46 V. c. 24, ss. 14, 15, 16 (D.) (re-enacted by 51 V. c. 29, s. 278), although passed after the date of the mortgage, applied, and that a sale of the railway could be validly made. *Peto v. Welland R. W. Co.*, 9 Gr. 455, and *Galt v. Erie R. W. Co.*, 14 Gr. 499, distinguished. A consent judgment directing a sale of the railway was vacated, and the defendants allowed to defend. *Toronto General Trusts Corporation v. Central Ontario R. W. Co.*, *Kitchie v. Blackstock*, *Central Ontario R. W. Co. v. Blackstock*, 6 O. L. R. 1.

**2. Second issue without payment of first—Conventional hypothec—Specific performance—Judgment.**—Where a valid issue of bonds has been made by a railway company under the provisions of the Quebec Railway Act, which at the time of their issue governed the company defendant,—the validity of the bonds so issued not being affected by the bringing of the company under the legislative control of the Parliament of Canada and the Railway Act of Canada by 57 & 58 V. c. 84,—the company cannot, in view of the provisions of s. 93, s.s. 4, of the Act above-mentioned, exercise again the bond-issuing power, unless the bonds first issued have been withdrawn and paid, or duly cancelled.—2. The obligation to grant a conventional hypothec constitutes an obligation to do an act (execution of an authentic instrument) which can only be performed by the debtor himself or some person authorized by him, and whereof the Court has no means of compelling specific performance, and the law nowhere authorizes the substitution by the Court of its own judgment for the authentic act executed by the debtor personally, or his authorized agent, which is essential to the creation and existence of a conventional hypothec.—3. The only hypothec which can result from the judgment of a Court is the judicial hypothec, which results from such judgments only as contain a condemnation to pay a specific sum of money.—4. An order to execute a conventional hypothec, unaccompanied by any alternative condemnation,—no alternative condemnation being asked in the event of failure to obey the order—would constitute a judgment not susceptible of execution, in contravention of Art. 541, C. C. P.—5. Where the plaintiff asks that a property be declared hypothecated, but does not indicate or sufficiently describe the property, either in the allegations or conclusions of his

declaration, the Court cannot take upon itself to ascertain and determine what specific property should be declared hypothecated. *Connolly v. Montreal Park and Island R. W. Co.*, Q. R. 22 S. O. 222.

## II. CARRIAGE OF GOODS.

**1. Claim for non-delivery — Special instructions — Acceptance by consignees—Warehousemen — Negligence—Amendment.]**—The plaintiffs for some time prior to and after 1897, had sold iron to a rolling mills company at Sunnyside. The defendants had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the rolling mills company had a siding capable of holding three or four cars. In 1897 the plaintiffs instructed the defendants to deliver all cars addressed to their order at Swansea or Sunnyside to the rolling mills company, and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company, and shipped to them at various times up to the 2nd January, 1900, five cars, one addressed to the company and the others to themselves, at Sunnyside, which the company refused to receive:—*Held*, affirming the judgment of the Court of Appeal, 22 Occ. N. 176, that the rolling mills company were consignees of all the cars, and that they had the right to reject them at Swansea if not according to contract. Having exercised such right, the defendants were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive the iron.—The Court of Appeal, while relieving the defendants from liability as carriers, held them liable as warehousemen, and ordered a reference to ascertain the damages on that head:—*Held*, reversing the decision, *MILLS, J.*, dissenting, that, as the action was not brought against the defendants as warehousemen, and as they could only be liable as such for gross negligence, and the question of negligence had never been raised nor tried, the action would be dismissed *in toto*, with reservation of the right of the plaintiffs to bring a further action should they see fit. *Frankel v. Grand Trunk R. W. Co.*, 23 Occ. N. 134, 33 S. C. R. 115.

**2. Negligence — Shipping bill—Bill of lading — Condition requiring insurance — Breach of — Condition limiting liability.]**—Under s. 246 of the Railway Act, a railway company are precluded from setting up a condition indorsed on a bill of lading relieving the company from liability for damages sustained to goods while in transit, where the dam-

age is occasioned through negligence.—Consignors by their own shipping bill agreed to insure the goods to be shipped, the railway company having thereby subrogated to consignees' rights in case of loss, and a condition of the bill of lading given by the railway company on the shipment of goods, required the consignor to effect an insurance thereon, which, in case of loss or damage to the goods, the company were to have the benefit of. The consignors insured the goods, but afterwards countermanded the insurance:—*Held*, that the bill of lading superseded the shipping bill and formed the contract between the parties, and that the railway company were, under s. 246, precluded from setting up the breach of such condition as a ground for relief from liability, when the damage to the goods had been occasioned through negligence. *St. Mary's Creamery Co. v. Grand Trunk R. W. Co.*, 23 Occ. N. 226, 5 O. L. R. 742.

## III. FARM CROSSINGS.

**1. Approaches — Repair.]**—Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto within the farm. *Palmer v. Michigan Central R. W. Co.*, 23 Occ. N. 205, 6 O. L. R. 90.

**2. Obligation to provide—Dominion Railway Act—Midland Railway Company — Ontario statutes.]**—The plaintiff's father in 1882 conveyed part of his farm to the Midland Railway Company, who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1900 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company:—*Held*, that the plaintiff could not compel the defendants who had acquired the Midland Railway in 1893, to provide a farm crossing, either by virtue of the Dominion Railway Act or of Ontario legislation applicable to the railway before 1893.—Review of the statutes affecting the Midland Railway Company. *Ontario Lands and Oil Co. v. Canada Southern R. W. Co.*, 1 O. L. R. 215, 21 Occ. N. 188, followed. *Carew v. Grand Trunk R. W. Co.*, 23 Occ. N. 226, 5 O. L. R. 653.

**3. Obligation to provide—Owner of farm — Date of acquisition — Jurisdiction of magistrate's court.]**—In an action for a farm crossing, it is sufficient if the plaintiff be shewn to be the actual *bonâ fide* owner, and in possession as

such, of the land crossed by the railway, although his title is not registered; and the fact that the land was purchased and cleared by him, long subsequent to the building of the railway, is no bar to his right of action.—2. The district magistrate's court has no jurisdiction to order the construction of a farm crossing, even when the cost thereof is alleged to be less than \$50, because such order would involve also the future maintenance of the crossing, would create a servitude, and would be interfering with future rights. *Bolduc v. Canadian Pacific R. W. Co.*, Q. R. 23 S. C. 238.

#### IV. FENCES.

**1. Absence of fence—Liability to strangers — Owner of land adjoining railway.]**—Section 179 of the Railway Act of Canada, 51 V. c. 29, obliging railway companies to erect fences on both sides of their railway, is imperative and in the public interest, and the responsibility which it imposes subsists in regard to an animal belonging to a third person which, being lawfully upon a neighbouring lot, is killed by reason of the absence of such fence, in spite of the fact that the company have omitted to erect such fence upon the request of the owner of the neighbouring land. *Quebec Central R. W. Co. v. Pellerin*, Q. R. 12 K. B. 152.

**2. Defective fencing—Cattle—Highway — Negligence.]**—The plaintiff was the owner of a field, bounded on the one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed, and, going over the land of a private owner, which was not fenced off from the switch, and then along a lane, she got on to the highway, and then proceeding along the highway she got to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train:—*Held*, that the defendants were liable therefor. *James v. Grand Trunk R. W. Co.*, 31 S. C. R. 420, distinguished. *Davidson v. Grand Trunk R. W. Co.*, 23 Occ. N. 185, 5 O. L. R. 574.

See *post* V. 4, VII. 1.

#### V. HIGHWAY CROSSINGS.

**1. Compensation to municipality —Terminus "at or near" point named.]**

—Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road.—A charter authorized the construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the counties of Vaudreuil, Prescott, and Russell:—*Held*, that, if it were necessary, the railway could pass through Carleton county, though it was not named:—*Held*, also, that in this Act the words "at or near the city of Ottawa" meant "in or near" said city.—Judgment of the Court of Appeal, 4 O. L. R. 56, 22 Occ. N. 24, affirming the judgment at the trial, 2 O. L. R. 336, affirmed. *Montreal and Ottawa R. W. Co. v. City of Ottawa, Canada Atlantic R. W. Co. v. City of Ottawa*, 23 Occ. N. 209, 33 S. C. R. 376.

**2. Leave to make — Railway Committee of Privy Council—Private bridge —Approaches to — Compensation — Injunction.]**—Leave granted by the Railway Committee of the Privy Council to a railway company to cross a public road upon which are the approaches of a bridge belonging to a private person, does not deprive this private person of his recourse for compensation, and, in default of a previous offer of compensation, he may by writ of injunction prevent the company from building their line upon these approaches. *Jones v. Atlantic and North-West R. W. Co.*, Q. R. 12 K. B. 392.

**3. Omission to ring bell or sound whistle — Contributory negligence.]**—The word "highway" in s. 256 of the Railway Act, 1888, requiring a bell to be rung or a whistle sounded by a railway locomotive engine on approaching a crossing over a highway, means a public highway, which is so as of right.—*Scoble*, that the question whether there is a public highway at any point is one which a County Court is precluded by s. 59 (d) of the County Courts Act, R. S. M. c. 33, from trying.—2. Where a trail or way over a railway track is used by the public by invitation or license of the railway company, a person crossing the track upon the same is bound to observe reasonable precautions to avoid injury by trains; and where the evidence shews that he has not done so, he cannot recover from the company for such injuries without proving that they were immediately caused by the negligence of the company's servants only.—*Quere*, whether the failure of the person in charge of a locomotive to ring a bell or



sound a whistle or observe other precautions on approaching such a crossing constitutes actionable negligence. *Cotton v. Wood*, 8 C. B. N. S. 568, and *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100, followed. *Royle v. Canadian Northern R. W. Co.*, 23 Occ. N. 25, 14 Man. L. R. 275.

**4. Speed of train — Fences—Statutory requirements — Negligence—Injury to person crossing track — Contributory negligence—Findings of jury.**—By the Dominion Railway Act, 1888, s. 197, as amended by 55 & 56 V. c. 27, s. 6, it is provided that "at every public road crossing at rail level of the railway the fence on both sides of the track shall be turned into the cattle guards, so as to allow of the safe passage of trains." By s. 259 of the former Act, as amended by s. 8 of the latter, it is provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act."—*Held*, that the words "in the manner prescribed by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically described in the railway legislation, the meaning of s. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.—The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was travelling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on the plaintiff's part; and the Court, though there was strong evidence of contributory negligence, declined to interfere. *McKay v. Grand Trunk R. W. Co.*, 23 Occ. N. 136, 5 O. L. R. 313.

#### VI. INJURY TO PERSONS.

**1. Passenger — Alighting from moving car — Negligence — Contributory negligence—Findings of jury—Damages.**—The fact of a passenger getting off a train while it is in motion is not in itself evidence of negligence. In every case it is a question to be

decided by the jury whether the passenger acted as a reasonable man would do under the circumstances.—Where a train scheduled to stop at a named station, did not, on arriving there, stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started, stumbled and fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court refused to interfere with their finding, or to reduce the damages awarded, \$1,000. *Keith v. Ottawa and New York R. W. Co.*, 23 Occ. N. 85, 5 O. L. R. 116.

**2. Passenger — Assaults on by fellow-passenger — Negligence — Duty of conductor.**—Action for damages for negligence of the defendants or their servants in failing, after due notice, to properly guard and protect the plaintiff against assault on one of their trains.—There was ample evidence that the plaintiff was assaulted and ill-used on the train, and that the conductor was told of the conduct of the assailant and of his threats to continue it:—*Held*, that it was for the jury to decide whether, with the knowledge the conductor had, he acted reasonably and diligently, or whether after being told, as he was by the plaintiff and others, of the assailant's drunken condition, and of the assaults he had already committed upon the plaintiff and other passengers before the train started, the conductor acted unreasonably and negligently in refusing and failing to take reasonable steps to prevent the subsequent assaults; and appeal by the defendants from the judgment of FALCONBRIDGE, C.J., at the trial upon a verdict of the jury in favour of the plaintiff, awarding him \$3,500 damages, dismissed. *Blain v. Canadian Pacific R. W. Co.*, 23 Occ. N. 65, 5 O. L. R. 334.

**3. Passenger—Mere licensee—Duty of company — Negligence.**—N. had a contract with the defendants to repair a bridge, and, while riding on the locomotive of the company's coal train on his way to the work, he was killed by reason of the train falling through the bridge. The engine driver in charge of the train (there being no conductor) had no authority to take passengers, and had instructions not to allow persons to travel on the engine without permission from some competent authority, but the company's officers and servants and other persons authorized by the manager and master mechanic used to ride on the coal train.—A few days before the accident N. and the defendants' manager had gone down to the bridge on the en-

gine of a coal train and returned the same way the same day.—In an action by N.'s representatives to recover damages from the company for his death, the jury found that the company had undertaken to carry N. as a passenger:—*Held*, that there was no evidence to support such a finding, and that N. was a "mere licensee."—The relation of common carrier and passenger does not exist when a person travels on the locomotive of a coal train without the permission of some officer who has authority to give such permission, and, if injured, such a person has no right to action unless injured through the *dolus* as distinguished from the *culpa* of the carrier. *Nightingale v. Union Colliery Co. of British Columbia*, 23 Occ. N. 206, 9 Brit. Col. L. R. 453.

## VII. LANDS.

1. **Deed — Construction — Fencing — Boundaries — Estoppel — Registry laws — Riparian rights — Prescription — Tenant by sufferance — Damages — Emphyteusis — Alienation — Parties.**—The plaintiffs, a railway company, purchased land from P. bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines, and the railway fencing was placed here and there above the water line, although the company could not have had the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip between the fence and the water's edge and of the bed of the stream *ad medium*, and, after the registration of the deed to the company, sold the rest of his property, including water rights, to the defendant's grantor, describing the property sold as "including that part of the river which is not included in the right of way," etc. The company never operated their line of railway, but leased it for 999 years to another company, by whom it was operated:—*Held*, that the description in the deed to the railway company included, *ex jure naturæ*, the river *ad medium*, as an incident of the grant.—2. That the possession by the vendor and his assigns of the strip and the bed of the river *ad medium*, was not the possession *animo domini* required for the acquisitive prescription of ten years under Art. 2251, C. C., but merely an occupation as tenant by sufferance.—3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession, could not be construed as conduct placing a different construction upon the deed.—4. That the terms of the description in the convey-

ance to the defendant's grantor, were a limitation equivalent to an express reservation of the part previously conveyed to the company, the defendant having also notice through the registration of the deed to the company.—5. That the acquisitive prescription of thirty years under Art. 2242, C. C., could not run in favour of the vendor.—6. That the lease to the company which held and operated the railway amounted to an emphyteutic lease assigning the *domaines utile* and all the company's right in respect of the railway, reserving, however, the *domaine direct*, and consequently the lessor company had the right of action *au petittoire*, although the lessees would have the right of action for damages, and might be added as plaintiffs if there were any valid claim for damages. *Massawippi Valley R. W. Co. v. Reed*, 33 S. C. R. 457.

2. **Entry without expropriation — Trespass — Injunction — Resolution of county council — Town within county.**—By the defendants' Act of incorporation (60 V. c. 82, N. S.) the lands required by them for track or station or like purposes "shall be a county charge and be payable by the county through which the line of railway passes, subject, however, to resolution of the municipal council of the said county authorizing the acquisition of said lands." The proposed line lay wholly within the county of A. A town, B., within the county, was incorporated in 1897, after the defendants' Act was passed, and lay in the proposed course of the railway. On the 23rd October, 1900, the county council passed a resolution that "a free right of way and lands necessary for railway purposes from V. B. to M., in the county of A., be granted" to the defendants, "said right of way to be paid for on the completion of said line of railway." In 1902, at the instance of the council of the town of B., an Act was passed, 2 Edw. VII. c. 62 (N. S.), authorizing the town to expropriate the necessary lands, and providing for entry thereon upon payment or tender of the compensation awarded by arbitrators. The Nova Scotia Railway Act, R. S. N. S. c. 90, provides (s. 164) that where the charter makes the cost of the right of way a charge upon any municipality, it shall not be necessary for the company to expropriate, and there is no provision authorizing the company to enter before the municipality has expropriated:—*Held*, that the plaintiff was entitled to have the defendants enjoined as trespassers from entering upon his lands in the town of B. until such lands had been expropriated and the compensation paid. *Caldar v. Middleton and Victoria Beach R. W. Co.*, 23 Occ. N. 18.

**3. Expropriation—Agreement with owner — Possession — Compensation — Damages — Arbitration — Action — Municipal corporation.]** — In carrying out the agreement provided for in 63 V. c. 77 (O.) the purchasing agents of a town corporation agreed with the plaintiff for the purchase of and possession by a railway company of the portion of the plaintiff's land required by the company, but without fixing the price.—The company, having, pursuant to s. 131 of the Railway Act, 51 V. c. 29 (D.), deposited a plan, profile, and book of reference of the land in the county registry office, which were approved by the Railway Committee of the Privy Council, entered and completed the work.—The purchase money not having been agreed upon or paid, the plaintiff brought an action against the town corporation and railway company for damages to the land and for interference with his business:—*Held*, that the defendants the town corporation were not liable, and that the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action.—*Per* FALCONBRIDGE, C.J., at the trial:—Expected increased profits from enlargement of plaintiff's buildings and plant are too speculative and uncertain to form a true measure of damage. *Todd v. Town of Meaford*, 23 Occ. N. 323, 6 O. L. R. 469.

**4. Expropriation — Statute—Construction — Tramway for transportation of materials.]**—The place where materials are found referred to in s. 114 of the Railway Act means the spot where the stone, gravel, earth, sand, or water required for the construction or maintenance of the railway are naturally situated, and not any other place to which they have been subsequently transported. — *Per* TASCHEREAU and GIBBOUD, J.J.: — The provisions of s. 114 confer upon railway companies a servitude consisting merely in the right of passage, and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction. *Quebec Bridge Co. v. Roy*, 23 Occ. N. 39, 32 S. C. R. 572.

**5. Subsidy — Mines and minerals—Reservation in grant — Dominion Lands Act.]** — By 53 V. c. 4, the suppliant railway company, among others, were authorized to receive a grant of Dominion lands of 6,400 acres for each mile of their railway, when constructed. Under the provisions of s. 2, the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and,

except as to such conditions, the said grants should be free grants, subject only to the payment by the grantee respectively of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of the Dominion Lands Act, which provided that all patents for lands in Manitoba and the North-West Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with full power to work the same. Orders in council authorizing the issue of patents for the lands in question to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in those orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889:—*Held*, that the regulation reserving mines and minerals applied to all grants of land made under the provisions of 53 V. c. 54, and that the omission of reference to such regulations in the orders in council authorizing patents to be issued did not alter the position of the suppliant railway company under the law. *Semble*, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands. *Calgary and Edmonton R. W. Co. v. The King*, 22 Occ. N. 426, 8 Ex. C. R. 83.

## VIII. OTHER CASES.

**1. Right to ferry passengers and cargo — Statute — Restrictions.]**—The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company authorizes them, for the purpose of their undertaking, to acquire and run steam and other vessels for cargo and passengers upon any navigable waters which their railway may connect with:—*Held*, that under the very large and general words of this clause the railway company were not bound to restrict the passengers and cargo transported by their vessels to persons and goods intended to be carried on their railway line. *Perry v. Clergue*, 23 Occ. N. 91, 5 O. L. R. 357.

**2. Seizure under execution — Description—Reseizure.]** — A railway was seized and sold by sheriff's sale to the present opposant. It was described as fifty feet in width, but the greater part of the line was actually sixty-six feet

wide. The present plaintiff now caused the line to be seized again, but stated exceptions from the seizure, which exceptions really included the entire road, less the surplus width:—*Held*, that the seizure was irregular and illegal, the adjudication by the sheriff being of a specific object, fenced at the time of the sale, and known as consisting of the property so enclosed. The error as to the width was immaterial unless it were to give a ground of action by the defendant to have the sale set aside. Moreover, a railway can only be seized as an entirety, which had not been done in the present case. *Carter v. Montreal and Sorel R. W. Co.*, Q. R. 23 S. C. 3.

**3. Undertaking for general advantage of Canada** — *Junction or crossing—Provincial railway—Connexion by means of independent branch—Railway Act—Construction.*—The Canadian Pacific Railway, the Great Northern Railway, the railway owned by the Quebec Railway, Lighting, and Motor Power Company, all three being railways which are undertakings for the general advantage of Canada and under the control of Parliament, and the Quebec and Lake St. John Railway, the latter being an undertaking purely Provincial and under the control of the Quebec Legislature, all four enter the city of Quebec; and the harbour commission of Quebec, which is under the control of Parliament, in order to facilitate these four railways in obtaining access to the pier Louise, constructed upon their own property a branch line of about 300 feet, which in no way entered into the system of these four railways, but by means of which the trains of the Quebec and Lake St. John Railway could pass upon the Canadian Pacific Railway and *vice versa*:—*Held*, that that did not constitute on the part of the Quebec and Lake St. John Railway a junction with the Canadian Pacific Railway, nor a crossing in the sense of s. 306 of the Railway Act of Canada, 1888, so as to render the Quebec and Lake St. John Railway an undertaking for the general advantage of Canada and to place it under the control of Parliament; the junction or crossing spoken of in s. 306 must be a physical connexion, immediate and without intermediary.—2. The general declaration of s. 306 is insufficient to render railways not mentioned in it in express and specific terms, undertakings for the general advantage of Canada. — 3. Reading together ss. 306 and 177 of the same Act, s. 306 must be interpreted as applying solely to a branch line of railway which by reason of a junction becomes part of the system of one of the railways enumerated in the section, and consequently a branch line of one of the railways.

*Garnau v. Quebec and Lake St. John R. W. Co.*, Q. R. 12 K. B. 205.

## RAILWAY COMMITTEE OF PRIVY COUNCIL.

See RAILWAY, V. 2.

## RATIFICATION.

See COMPANY, I. 4—CONTRACT, IV. 1—MUNICIPAL CORPORATIONS, XII. 2—SOLICITOR, 1.

## REAL PROPERTY ACT, MANITOBA.

See COSTS, VII. 10.

## REAL PROPERTY ACT, N. W. T.

See REGISTRY LAWS, 2.

## REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS, 1.

## RECEIVER.

**Equitable execution** — *Judicature Act*, s. 58, s.-s. 9—*Property to be reached—Book debts—Shares in foreign company—Insurance policy.*—The provision in s. 58, s.-s. 9, of the Judicature Act, R. S. O. 1897 c. 51, that a receiver may be appointed in all cases in which it shall appear to be just or convenient that such order should be made, was intended merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone:—*Held*, that a judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another, assigned to the debtor. *In re Asselin and Cleghorn*, 23 Occ. N. 288, 6 O. L. R. 170.

See EXECUTION, I. 1—INJUNCTION, 6—PARTNERSHIP 9.

**RECORDER'S COURT OF MONTREAL.**

See COURTS, VIII.

**REDEMPTION.**

See CONSTITUTIONAL LAW, 8—HUSBAND AND WIFE, IX. 5—MORTGAGE, 3—SOLICITOR, 4.

**REFEREES AND REFERENCES.**

1. **Drainage Referee** — *Official Referee* — *Reference* — *Statutes*.] — The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee. — Provisions of the Judicature, Arbitration, and Drainage Acts, discussed. — Decision of a Divisional Court, 22 Occ. N. 255, 4 O. L. R. 97, reversed. *McClure v. Township of Brooke, Bryce v. Township of Brooke*, 23 Occ. N. 40, 5 O. L. R. 59.

2. **Report on sale** — *No sale for want of bidders* — *Confirmation*.] — A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from, and requires confirmation. — And an order made by a local Judge (without consent) confirming such a report four days after it was made, and granting foreclosure in default of payment, was held bad. *Robert v. Oughell*, 23 Occ. N. 305, 6 O. L. R. 381.

3. **Stay of reference pending appeal** — *Ruling of Master in Ordinary* — *Appeal from* — *Forum*.] — A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826:—*Held*, that the reference was stayed pending the appeal. — Construction and application of Rules 827 and 829. — The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in s. 75 (2) of the Judicature Act, R. S. O. 1897 c. 51; and an appeal from his ruling lay to a Judge in Court. *Monro v. Toronto E. W. Co.*, 23 Occ. N. 12, 5 O. L. R. 15.

See APPEAL, VIII. 1 — DISTRIBUTION OF ESTATES, 7—INTEREST, 4—JUDGMENT, II. 8—LUNATIC, 1.

**REFERENDUM.**

See CONSTITUTIONAL LAW, 9, 10 — LIQUOR ACT OF ONTARIO — MANDAMUS, 2.

**REGISTRATION.**

See BILLS OF SALE AND CHATTEL MORTGAGES—COPYRIGHT—REGISTRY LAWS — SALE OF GOODS, II. 1 — TRADE MARK.

**REGISTRY LAWS.**

1. **Certificate of allowance of petition under Partition Act** — *Lien of execution creditor* — *Expiry of writ* — *Notice* — *Bona fide purchaser for value* — *Priorities*.] — At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a *bona fide* purchaser for value: — *Held*, that the company's lien was not preserved by the proceedings taken before the conveyance to G., who was not, therefore, affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands. *Macdonell v. Best*, 23 Occ. N. 262, 6 O. L. R. 18.

2. **Territories Real Property Act** — *Unregistered transfer* — *Execution* — *Priority* — *Cloud on title* — *Sheriff* — *Parties* — *Costs*.] — The Territories Real Property Act has not altered the law that a writ of execution binds only the beneficial interest of the execution debtor; and therefore a transferee (whose transfer is unregistered) from the certificated owner is entitled to have an execution, filed subsequently to the making of the unregistered transfer, declared to be a cloud upon his title; so likewise is entitled a

person who, though he has received no actual transfer, is entitled to one under an enforceable agreement.—To such an action the sheriff, against whom an injunction is asked to restrain proceedings upon the execution, is a proper party.—Where in such an action the sheriff joined in, and set up, the same defences as the execution creditor, he, as well as the execution creditor, was ordered to pay the costs. *Wukie v. Jellett*, 2 Terr. L. R. 133, 15 Occ. N. 315. Affirmed 26 S. C. R. 282, 16 Occ. N. 260.

See ASSESSMENT AND TAXES, II. 2, 3 — DOWER, 2 — EXECUTION, II. 4 — FIXTURES, 3 — HUSBAND AND WIFE, V. 3, VIII. 2 — INDIAN LANDS — RAILWAY, VII. 1 — SUBROGATION — VENDOR AND PURCHASER, 11.

### RELATOR.

See MUNICIPAL ELECTIONS.

### RELEASE.

See MASTER AND SERVANT, II. 1.

### RELIGIOUS INSTITUTIONS.

See CHURCH.

### RENEWAL OF LEASE.

See LANDLORD AND TENANT, III. 13.

### RENT.

See APPEAL, X. 9 — ATTACHMENT OF DEBTS, I. 5, 7 — BANKRUPTCY AND INSOLVENCY, I. 16 — COURTS, IX. 2, 4 — LANDLORD AND TENANT — PRINCIPAL AND SURETY, 4 — VENDOR AND PURCHASER, 5 — WILL, I. 2.

### REPLEVIN.

1. *Saisie-revendication* — *Affidavit—Irregularities—Procedure* ] — It is not by an exception to the form, but by a petition in contestation, that the defendant to a *saisie-revendication* must make complaint of irregularities in the affidavit upon which the *saisie-revendication* was issued. *Albert v. Gravel*, Q. R. 22 S. C. 478.

2. *Saisie-revendication* — *Title—Res judicata* — *Petition* — *Winding-up Act.*]—Where a person has petitioned in proceedings under the Winding-up Act to be put in possession of certain articles of which he alleges that he is owner, and judgment has been given granting the prayer of his petition as to certain of such articles, without adjudicating as to the others, he may subsequently replevy the other articles, although they have been sold by the liquidator to a third person; and such third person cannot plead that the judgment upon the petition is *res judicata* against the claimant.—2. A *saisie-revendication* may be taken against the party in possession of the thing, even if he detains it by virtue of an uncertain, temporary, and conditional title. *United Shoe Machinery Co. of Canada v. Flibotte*, 5 Q. P. R. 333.

See COSTS, VI. 12 — FIXTURES, 3 — GIFT, 6 — HUSBAND AND WIFE, V. 1, VIII. 1, X. 1 — INJUNCTION, 3 — LIS PENDENS, 2 — SALE OF GOODS, II. 2 — WRIT OF SUMMONS, II. 4.

### REPLY.

See PLEADING, VIII.

### REPORT ON SALE.

See REFEREES AND REFERENCES, 2.

### REPRESENTATION OF PARTIES.

See PARTIES, 8.

### REPRESENTATION OF PROVINCES.

See CONSTITUTIONAL LAW, 4.

### RES JUDICATA.

See CRIMINAL LAW, IV. 1 — DAMAGES, 2 — EXTRADITION — JUDGMENT, II. 5 — PLEADING, III. — PRINCIPAL AND SURETY, 2 — REPLEVIN, 2.

### RESCISSION.

See CONTRACT, VI. — CROWN, I. 1 — FRAUD AND MISREPRESENTATION — LANDLORD AND TENANT, III. 14, 15, VI. 1 — PARTIES, 4 — PRIVY COUNCIL, 2 — PRINCIPAL AND SURETY, 4 — SALE OF GOODS, V. 2 — VENDOR AND PURCHASER, 4, 8, 10.

**RESIDENCE.**

See **ARREST**, III. 4—**COSTS**, VII.—**Mechanics' Liens**, 1 — **Municipal Corporations**, VI. 2—**Parliamentary Elections**, IV.—**Partnership**, 4—**Pleading**, IV. 6—**Schools**, 3.

**RESISTING DISTRESS.**

See **CRIMINAL LAW**, II. 12.

**RESTRAINT OF TRADE.**

See **CONSPIRACY** — **COVENANT IN RESTRAINT OF TRADE**.

**RESTRAINT ON ALIENATION.**

See **WILL**, IV. 2, 3.

**RETAINER.**

See **SOLICITOR**, 7, 8.

**REVENDEICATION.**

See **REPLEVIN**.

**REVENUE.**

1. **Customs duties** — *Foreign-built ship—Statutes.*] — A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, sched. A., item 409. Judgment in 22 Occ. N. 249, 32 S. C. R. 277, affirmed. *Algoma Central R. W. Co. v. The King*, [1903] A. C. 478.

2. **Customs duties**—*Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption as to good faith.*]—The Crown is not liable, under the provisions of Arts. 1047 and 1049, C. C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act.—*Wilson v. City of Montreal*, 24 L. C. Jur. 222, approved.—*Per Strong, C.J. (dubitante).*—The error of law mentioned in Arts. 1047 and 1049, C. C., is the error of the party paying and not that of the party receiving. Money paid under

compulsion is not money paid under error within the terms of those Articles.—*Toronto Railway Co. v. The Queen*, 4 Ex. C. R. 262, 25 S. C. R. 24, [1896] A. C. 551, discussed.—*Algoma Railway Co. v. The King*, 7 Ex. C. R. 239, referred to. Judgment appealed from, 7 Ex. C. R. 287, 22 Occ. N. 86, affirmed. *Ross v. The King*, 23 Occ. N. 33, 32 S. C. R. 532.

3. **Inland Revenue Act—Possession of still—Conviction—Jurisdiction of stipendiary magistrate—Penalty—Commitment—Misdemeanour—Constitutional law.]—The defendant was convicted for a like offence, committed at the same time, as that referred to in *Rea v. Brennan*, 35 N. S. Reps. 106.—In addition to the grounds relied on in the Brennan case, in support of the application to set aside the conviction, and for the prisoner's discharge, the further objection was taken that the jurisdiction of the magistrate, by s. 113, was limited to cases where the penalty or forfeiture was not in excess of \$500, whereas, reading ss. 124, 159, and 160 together, the penalty, in this case, would be in excess of that amount. Also, that, under the commitment, the prisoner was required to be detained until he paid a larger amount than he was adjudged to pay.—It being admitted that there was a good conviction:—*Held*, that ss. 886, 896, of the Criminal Code applied, and that the objections taken afforded no ground for the prisoner's discharge:—*Held*, also, that calling the offence a misdemeanour would not affect the jurisdiction of the stipendiary magistrate, which was clearly given under the Inland Revenue Act, R. S. C. c. 34, s. 113:—*Held*, also, following *Attorney-General v. Flint*, 16 S. C. R. 707, that the Dominion Parliament had power to create such a court. *Rea v. Kennedy*, 35 N. S. Reps. 266.**

4. **Succession duty** — “*Dutiable*” property — *Transfer of property before death—Donatio mortis causa—Contract—Consideration—Estoppel—Survivorship.*]—The aggregate value of the estate of an intestate was \$12,877, and of this \$7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a *donatio mortis causa*, as established in *Brown v. Toronto General Trusts Corporation*, 32 O. R. 319:—*Held*, that the \$7,540 was not dutiable under the Succession Duty Act, R. S. O. 1897 c. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but one made in pursuance of a contractual obligation for value; and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Cor-

poration, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract:—*Held*, also, that the \$7,540 did not pass by survivorship within the meaning of s. 4 (d) of R. S. O. 1897 c. 24. *Attorney-General for Ontario v. Brown*, 23 Occ. N. 90, 5 O. L. R. 167.

**5. Succession duty—Property exempt—Sale under will—Duty on proceeds—Costs—Crown.**—Debentures of the Province of Nova Scotia are, by statute, “not liable to taxation for provincial, local, or municipal purposes” in the Province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate:—*Held*, affirming the judgment appealed against, 35 N. S. Reps. 223, *SEDGEWICK and MILLS, JJ.*, dissenting, that, although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale, when passing to legatees, were. Costs will be given for or against the Crown as in other cases. *Lovitt v. Attorney-General for Nova Scotia*, 23 Occ. N. 212, 33 S. C. R. 350.

**6. Succession duty—Provisions of will—Income only payable for life or years—When duty payable on corpus.**—The scheme of the Succession Duty Act, R. S. O. 1897 c. 24, is to provide a duty on succession to property by persons succeeding to estates and interests in property by testate or intestate title.—A testator by his will devised his estate to trustees upon trust to collect the income and apply it or such part as the trustees thought proper for the benefit of children and grandchildren for the period of 21 years after his death, and to pay over to the beneficiaries the whole income, without accumulations, for the period between the end of the 21 years and the death of the last surviving child:—*Held*, that there was a plainly marked out period in the future, not sooner than 21 years, when the corpus of the estate was to be divided; that there was a prior interest for life or years according to the event in fact, during which the trustee, standing in *loco parentis*, was entitled to the present income of the property until the time arrived when the corpus was to be divided: that when there is a present enjoyment there should be present payment of the duties based upon the estate or interest which is enjoyed; that there was a prior estate for

years or for life, after which came the future estate in fee, not now to be levied upon for duty; and that only the income was presently liable to the payment of succession duty. *Attorney-General for Ontario v. Toronto General Trusts Corporation*, 23 Occ. N. 89, 5 O. L. R. 216.

**7. Succession duty—Quebec Act—Construction—Application to Ontario property.**—Taxes imposed on movable property by the Quebec Succession Duty Act of 1892 and the amending Acts apply only to property which the successor claims under or by virtue of Quebec law, and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario. Judgment of the Court of King's Bench, Quebec, affirming judgment in 21 Occ. N. 250, Q. R. 18 S. C. 184, affirmed. *Lambe v. Manuel*, [1903] A. C. 68.

See CONSTITUTIONAL LAW, 11—COSTS, I. 6—CROWN, I. 2—WILL, II. 5.

## REVISING OFFICER.

See CONTEMPT OF COURT, 4—MANDAMUS, 1.

## REVIVOR.

See PLEADING, III.

## REVOCATION.

See GIFT, 7.

## RIPARIAN RIGHTS.

See NEGLIGENCE, 5—RAILWAY, VII. 1—WATER AND WATERCOURSES, 2, 6, 8—WAY, II. 1.

## RIVERS AND STREAMS.

See APPEAL, II. 5—CONSTITUTIONAL LAW, 2—CROWN, III. 6—INJUNCTION, 8—NEGLIGENCE, 5—WATER AND WATERCOURSES—WAY, II. 1.

## ROAD.

See WAY.



**ROYALTIES.**

See MINES AND MINERALS, 8.

**SAISIE-ARRET.**

See ATTACHMENT OF DEBTS.

**SALARY.**

See COMPANY, I. 1—COURTS, VIII.—CROWN, IV. 3—INTEREST, 4.

**SALE OF GOODS.**

- I. ACCEPTANCE.
- II. CONDITIONAL SALE.
- III. CONTRACT.
- IV. DELIVERY.
- V. WARRANTY.
- VI. OTHER CASES.

See CARRIERS, 3—CONTRACT, IV. 6, 7—CONVERSION—DAMAGES, 7—EXECUTION—HUSBAND AND WIFE, IV. 3—INJUNCTION, 1—LIMITATION OF ACTIONS, II. 4—MASTER AND SERVANT, I. 2—NEGLIGENCE, 3—NOTICE OF ACTION, 1—PRINCIPAL AND AGENT, 6—SET-OFF—SHIP, III.—WRIT OF SUMMONS, I. 3, 11.

**I. ACCEPTANCE.**

**1. Defence as to quality—Offer to return and cancel sale.]**—In an action for the price of goods and delivered, the defendant cannot plead that the goods delivered to him were not of the quality stipulated for and that he has been obliged to replace them by other goods, without at the same time offering to the plaintiff the goods received from him, and demanding the cancellation of the sale. *Dominion Bag Co. v. Bull Produce Co.*, 5 Q. P. R. 175.

**2. Refusal to accept—Entire contract—Failure to supply part.]**—The respondent ordered, by illustrated descriptive catalogue received from the appellant, several articles of furniture, at the prices stated in the catalogue, for furnishing a cottage in the country. The order included a table styled a "monk's bench." The appellant, being unable to supply this article as described in the catalogue, substituted another table of a similar character. Some of the other articles sent also differed slightly from

the description in the catalogue. The respondent, treating the order as an entire contract, refused to accept the whole or any part of the articles sent to him. Subsequently, the appellant offered to take back the article substituted for the "monk's bench." The action, however, was brought for the price of all the articles sent:—*Held*, affirming the judgment in 21 Q. R. S. C. 336, that the order of the respondent being for specified articles forming a suite of furniture for a cottage, the order was an entire contract, and the respondent was entitled to get exactly what he had ordered; and, in default, to refuse acceptance of articles different from those contracted for, and also to recover his disbursements made under the contract. *Tobey Furniture Co. v. Macmaster*, Q. R. 12 K. B. 34.

See post III. 4.

**II. CONDITIONAL SALE.**

**1. Hire receipt—Registration—Bills of Sale Ordinance, N. W. T.—Possession—Description of goods.]**—The Ordinance respecting receipt notes, hire receipts, and orders for chattels (No. 8 of 1889) requires such instruments to be registered "where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee." The instrument in question in this case provided that "the title, ownership, and right to the possession of the property for which this note is given, shall remain in" the bailors:—*Held*, that, inasmuch as the "receipt note" in question in this case provided that the bailors might on certain contingencies take possession of the property, though the right of possession was in the bailors, the actual possession was to pass to the bailee, and therefore the instrument was one which came within the terms of the Ordinance.—*Sutherland v. Mannia*, 8 Man. L. R. 541, and *Boyce v. McDonald*, 9 Man. L. R. 297, considered.—The Ordinance provides (s. 2) that the provisions of the Ordinance respecting Mortgages and Sales of Personal Property (No. 18 of 1889) and amendments thereto shall apply to such receipt notes, hire receipts, or orders for the purposes of this Ordinance, in so far as the provisions thereof may not be incompatible with or repugnant to this Ordinance:—*Held*, that this provision made applicable to such instruments s. 8, Ord. No. 18 of 1889, which provides that mortgages, sales, assignments, or transfers of goods and chattels shall contain such sufficient and full description thereof that

the same may be readily and easily known and distinguished. — The receipt note in question in this case stated that it was "given for one team of oxen:"—*Held*, that, inasmuch as the instrument itself shewed further that the team of oxen was one bought by the bailee from the bailors for the price therein mentioned, that the team, immediately previous to the bailment, had been owned by the bailors, and at the time thereof was taken over by, and was in possession of, the bailee, the team of oxen was sufficiently described. *Western Milling Co. v. Darke*, 2 Terr. L. R. 40.

**2. Property not passing — Judgment for price—Bar to *saisie-revendication*.]** — Where a vendor has obtained judgment upon promissory notes, representing the price of machines sold, and at the time of sale it was provided by special contract that these machines should remain his property until they should be entirely paid for, he cannot, without first having desisted from his judgment, issue a *saisie-revendication* for the machines, or obtain a declaration that he is the owner of them, and thus have a new judgment against the defendant. *Plessisville Foundry v. Levesque*, Q. R. 22 S. C. 306.

### III. CONTRACT.

**1. Completion—Time of payment.]** —It is not, in principle, necessary for the completion of a contract for sale of goods that the time for payment of the price shall be fixed; it is sufficient if the parties are agreed as to the price of the thing sold. *Hurlburt v. Stewart*, Q. R. 24 S. C. 19.

**2. Condition — Measurement of logs by surveyor — Action for price — Evidence.]**—An agreement for the sale of logs contained a condition that the logs were to be surveyed by any surveyor the vendee might have in his employ and that such survey was to be final:—*Held*, that proof of such a survey was, in the absence of any charge of fraud or incompetency on the part of the vendee's surveyor, a condition precedent to the plaintiff's right to recover the price of the logs, and that the trial Judge was in error in rejecting the evidence of such surveyor on the ground that he was not proved to have been a duly sworn surveyor, appointed by the municipality and under bonds. *Patterson v. Larsen*, 36 N. B. Reps. 4.

**3. Condition as to acceptance — Post letter — Time limit—Term for de-**

**livery—Breach of contract—Damages—Counterclaim—Right of action.]** — The plaintiff on 2nd October, 1899, wrote offering to supply the defendants with 37 car loads of hay at prices mentioned "subject to acceptance within 5 days, delivery within 6 months." On the 5th October the defendants replied: "We will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand, and also get off the 7 cars as early as possible . . . We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was registered, and, although it reached the plaintiff's post office within the five days, was not received by him until the following day. The hay was not delivered, and, before the expiration of the six months named for delivery, the defendants, in defence to this action (which was brought in respect of earlier transactions), counterclaimed for damages for breach of contract in the non-delivery of the 37 car loads:—*Held*, that the correspondence did not constitute a binding contract, as the parties were never *ad idem* as to all the terms proposed.—2. That, as the six months limited for making delivery had not expired, the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature. *Oppenheimer v. Brackman and Ker Milling Co.*, 23 Occ. N. 62, 32 S. C. R. 699.

**4. Correspondence—Condition as to quality — Acceptance — Completed contract—Breach.]**—The plaintiffs offered to buy a quantity of fish from the defendants, at a price twenty-five cents per quintal above the Halifax price, provided the fish were so cleaned, or prepared for market, as to leave "little, if any, blood or black spot."—The defendants answered, guaranteeing to furnish the quantity of fish required, at the price specified, and prepared as required by the plaintiffs, "with one exception, that it is impossible for us to take all black skin from the napes of fish."—The plaintiffs, in reply, stated that the condition which the defendants wished to except was the most important requisite, that it was done in the case of all fish caught and cured in Iceland, and other places mentioned, and that, for this one reason, fish from those countries sold at a fair price, when fish not so prepared could not be sold at all.—

The defendants failed to make any immediate reply to this letter, and the plaintiffs wrote again, asking whether the defendants had decided to supply the cargo in the condition the plaintiffs would like to have it, as *per* their previous letter.—The defendants thereupon wrote: "We will furnish any quantity of fish that you want, suitable for any market, at the price you offered." They added: "I will do my best in regard to removing the black skin, as you stated in your previous letter."—To this letter the plaintiffs replied, stating that they would take a cargo of 2,500 quintals, "according to previous arrangement as to quality and price." The defendants failed to deliver the fish, as required, and the plaintiffs claimed damages:—*Held*, that, notwithstanding the words "I will do my best," there was a complete contract, upon which the plaintiffs were entitled to recover. *Anglo-Newfoundland Fish Co. v. Smith*, 35 N. S. Reps. 267.

See *ante* I. 2, *post* V.

#### IV. DELIVERY.

**1. Denial of delivery—Novation—Evidence of inferior quality—Admissibility—Amendment.**—Where, in an action for the price of piles of red pine, sold and delivered to the defendant, the plea, in addition to a general denial of delivery, was to the effect that the plaintiff had accepted other persons as his debtors instead of the defendant, thereby creating novation, evidence of the inferior quality of the goods supplied is irrelevant to the issue, and inadmissible.—2. Amendment of the plea at the trial, in order to allege that the goods supplied were not in conformity to the contract, ought not to be allowed, more particularly where the evidence did not shew objection or refusal to accept on the ground at the time of delivery. *Veilleux v. Atlantic and Lake Superior R. W. Co.*, Q. R. 23 S. C. 217.

**2. Denial of sale and delivery—Burden of proof—Corroboration—Appeal—Reversal of judgment.**—In an action for the price of goods sold and delivered, judgment was given in favour of the defendants at the trial, on the ground that the denial of the sale and delivery threw the burden of proof upon the plaintiffs, and that they had failed to satisfy this burden, there being a conflict of evidence between the plaintiffs' traveller, E., and the defendant M.—It appearing from the evidence that the ground upon which the case was determined at the trial was wrong, the evidence of E. being corroborated in a number of particulars, and

there being a preponderance in favour of the plaintiffs:—*Held*, that the appeal should be allowed and judgment entered for the plaintiffs for the amount of their claim, with costs of action and appeal. *Fraser v. McCurdy*, 35 N. S. Reps. 467.

**3. Failure of seller to deliver part—Action by purchaser—Damages—Proportionate value.**—A purchaser who is not put in possession of a part of the goods sold to him *en bloc*, can claim from the vendor only the value of the part which he has not received in proportion to the total price, and the damages mentioned in Art. 1518, C. C.; all other damages will be refused upon defence in law. *Muscat v. Montreal Hardware Manufacturing Co.*, 5 Q. P. R. 197.

**4. Non-delivery of quantity contracted for—Measure of damages—Measurements—Specifications—Interest—Mise en demeure.**—An insolvent had agreed to deliver to V., a creditor, upon a certain dock, a quantity of wood at so much per foot, the expenses of measurement to be paid by the insolvent, who was to furnish specifications to V., the measurement to be made by the measurers of the Quebec harbour commission:—*Held*, that the delivery was not complete until the measurement had been made and the specifications furnished to V.; also that it was incumbent on the insolvent or on the curator representing him to prove his allegation that V. had received a larger quantity of wood than the specifications shewed or than V. admitted, and the proof of that must be clear and certain.—2. In a commercial matter interest upon money does not run unless it be alleged and shewn that it is allowed by commercial usage.—3. In a commercial matter *mise en demeure* arises by lapse of time alone.—4. By the default of the insolvent to deliver to V. the quantity of wood which he had contracted to deliver to him, V. had the right as damages to the difference between the price upon which he had agreed with V. and the price at which he had sold or could re-sell the wood.—5. In a commercial matter it is necessary to be faithful and to fulfil exactly a contract within the time agreed, for a disturbance may quickly be caused in the affairs of a trader by reason of one with whom he has contracted not punctually fulfilling his obligations. *In re Moisan*, Q. R. 22 S. C. 423.

#### V. WARRANTY.

**1. Absence of—Waiver of inspection—Damages for inferior quality.**—Cheese was sold without special warranty as to

quality, but subject to inspection at the factory before shipment. The purchaser's agent did not avail himself of the opportunity to make an inspection at the factory. The purchaser complained after delivery that the quality of the cheese was inferior, and that some damage had been done by nails in packing it, and he tendered the price, less half a cent per pound, deduction for damage. The Court below allowed a deduction for the damage by packing, but maintained the action for the balance. The defendant inscribed in review:—*Held*, that there being no special warranty as to quality, and the buyer, by his agent, having waived inspection at factory by asking that the cheese be forwarded before it had been inspected, could not afterwards claim damages for inferior quality, which, if it existed, would have been disclosed by the inspection. *Lebrecoque v. Duckett*, Q. R. 22 S. C. 135.

**2. Breach — Rescission of contract — Fraudulent representations — Finding of jury — Appeal — Value of goods.]**—Where a chattel sold with a warranty is delivered as agreed upon and is not up to the warranty, that fact, in the absence of fraud, affords no ground for rescinding the contract, but the remedy is for a breach of warranty. A court of appeal will not disturb the finding of a jury on a question of fraudulent representations, where there is any evidence upon which the verdict may reasonably be supported.—Evidence of the value of the chattel (a horse) at the time of the trial, a year after the sale, was properly rejected when offered to prove the value at the time of the sale. *Finn v. Brown*, 35 N. B. Reps. 335.

**3. Correspondence — Construction — Breach — Damages.]**—The plaintiff, a private banker, wrote to the defendants, safemakers, for an estimate of a burglar proof door. The defendants, in answer, described No. 67, as 1½ inches thick, the entire surface protected with hardened drill proof plate, and enclosed a cut of No. 67, called "fire proof vault door with chilled steel lining." The plaintiff, in reply, asked whether No. 67 would furnish a fair protection against burglars, and the defendants answered, "No. 67 door gives both fire and burglar proof protection." The plaintiff purchased a No. 67 door: which was blown open by burglars. It appeared that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave entrance to further explosives by which the door was wrecked.

The door having been taken to pieces, it was found that the centre layer of the three layers making up the door, represented to be hardened drill proof plate, was not so, and was easily perforated by a hand drill:—*Held*, that the correspondence could not be construed as containing an absolute warranty on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time or place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safemakers could make them. Both warranties had been broken.—*Held*, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of these defects was not the reason why the burglars were enabled to break it open; but the plaintiff, having sustained a total loss by reason of the article supplied being valueless, was entitled to recover as damages the price, \$250. *Denison v. Taylor*, 23 Occ. N. 264, 6 O. L. R. 93.

**4. Express stipulation of no warranty — Fraudulent concealment of defect.]**—"Tic" or "rot" in a horse is a defect for which a contract for the sale of the horse can be set aside.—2. Even where the seller of a horse sells it without warranty, and the purchaser buys it at his own risk, the seller will be held to have warranted it if at the time of sale he knew that the horse had such a defect: for, in stipulating that there shall be no warranty in these circumstances, he has been guilty of fraud as against the purchaser.—3. When the seller has refused to cancel the sale of a horse having, to his knowledge, such a defect, and persists in his refusal in his defence to an action, he cannot object that the buyer has not offered the horse back to him before action: the fraud practised leaving the purchaser always in a position to rescind the fraudulent sale. *Ducharme v. Charest*, Q. R. 23 S. C. 82.

## VI. OTHER CASES.

**1. Illegality of sale — Intoxicating liquors — Liquor License Act — License**

**SCHOOLS.**

*in name of one partner.*]—Where a firm sold intoxicating liquors in quantities for which, under s. 78 of the Liquor License Ordinance (C. O. 1898 c. 89), action may be brought, but the only license under which the firm purported to sell was one issued to one of the members of the firm in his own name:—*Held*, that the plaintiffs could not recover in respect of the liquors; but the action being upon a bill of exchange, and an additional open account, judgment was given for the portion of each which were not for intoxicating liquors. *Indian Head Wine and Liquor Co. v. Skinner*, 23 Occ. N. 73; *Pisson v. Skinner*, 5 Terr. L. R. 391.

**2. Non-payment of price—Liability of transferee to vendor.**]—A person who, not being the purchaser, obtains goods which have not been paid for, does not thereby incur the obligation of paying for them. *Walker v. Lamoureux*, Q. R. 21 S. C. 492.

**3. Right of unpaid vendor — Conservatory attachment — Insolvency — Time for seizure.**]—When a conservatory attachment is issued and the property of a person who is not shewn to be a trader is seized by the unpaid vendor thereof, the attachment will not be quashed upon petition on the ground that the seizure was not made within thirty days of the delivery of the goods. *Swaeschnikoff v. Breitman* 6 Q. P. R. 30.

**SALE OF LAND.**

See COMPANY, III. 11—DEVOLUTION OF ESTATES ACT—EXECUTION, IV.—PRINCIPAL AND AGENT, 7-10—REFEREES AND REFERENCES, 2—SPECIFIC PERFORMANCE — VENDOR AND PURCHASER.

**SALVAGE.**

See INSURANCE, IV.

**SALVATION ARMY.**

See PARTIES, 10, 11.

**SAVINGS BANK DEPOSIT.**

See GIFT, 3.

**SCALE OF COSTS.**

See COSTS, VI.

**1. Protestant school — Pupil of another faith — Scholarship — Withholding — Mandamus — School regulations.**]—The petitioner, a British subject, resident in Montreal, but not the owner of real estate, was by religion a Jew. His son was admitted to a Protestant school under the control of the respondents, and by his success in his classes and in the examinations would, in ordinary course, have been entitled to a commissioners' scholarship, which gives a right to a high school course free of tuition fees. The commissioners having, under their regulations, withheld the scholarship, the petitioner applied for a writ of *mandamus* to compel the respondents to grant his son such scholarship:—*Held*, that the remedy by *mandamus* was the proper one under the circumstances, the petitioner alleging the refusal on the part of the respondents to perform a duty incumbent on them by law.—2. The petitioner not being a Protestant, and not being the owner of real estate inscribed on the Protestant panel, his son was not entitled, as of right, to admission to the Protestant schools.—3. His admission to a Protestant school by grace of the Protestant school commissioners did not amount to a warranty that the existing school regulations were to be permanent and unchanged throughout the entire scholastic course.—4. The respondents had, within the limits of their corporate authority, power to change the school regulations from year to year, and particularly in regard to prizes and other competitive rewards; and, consequently, they had power to provide by regulation that the child of a Jew, not the owner of real estate, should be ineligible to compete for a commissioners' scholarship. *Pinsler v. Protestant Board of School Commissioners*, Q. R. 23 S. C. 365.

**2. Public schools — Alteration of school sections — Appeal — Arbitrators — By-law — Description of lots.**]—The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of ratepayers, have power only to grant or refuse what is asked for in the petition, and have no power to direct the formation of a section differing from that asked for in the petition. *Re Southwold School Sections*, 3 O. L. R. 81, applied.—In by-laws altering existing school sections or adding territory to them, the lots and parts of lots dealt with must be accurately and exactly described. *In re Sydenham School Sections*, 23 Occ. N. 305, 6 O. L. R. 417.

**3. Public schools — Erection of school district — Consent of ratepayers — "Actual resident" — Person "Affected" — Residence — Domicil.]**—The expression "all the resident ratepayers affected by such permission," as used in s. 12 of the School Ordinance, c. 75, C. O. 1898, means, not, "all the resident ratepayers," but only those who are affected by the district being more than five miles long, and when the district purported to be erected is in fact over five miles long, the residents in each of the tiers of sections which lie at the extremities of the district must be considered as affected, since it is impossible to say which tier should be regarded as the excess in length.—Where a ratepayer owned real property in the district, and had a house with furniture in it locked up on this property, but rented a house out of the district for the use of his wife and family, while he was prospecting in the mountains and for some time also working in a coal mine, both out of the district:—*Held*, that he was not an "actual resident" whose consent in writing could be required under s. 12.—The meaning of "residence," "actual residence," and "domicil," considered. *Curren v. McEachen*, 5 Terr. L. R. 333.

**4. Public schools — School rates — Partnership — Co-owners of mine—Assessment.]**—The Act to amend and consolidate the Acts relating to public instruction, Acts 1895 c. 1, in relation to the assessment of property for school purposes, provides that all ratable property belonging to any association, corporation, or firm shall be assessed in the name of the firm, association, or corporation:—*Held*, that the defendants were properly assessed as a firm, in respect of a mining property owned by them in the plaintiffs' section, the property having been purchased by the defendants with a view to working or sale, and having been worked by them jointly for upwards of two years, the proceeds, after paying expenses, being equally divided.—The evidence shewed a community of interest in the profits and losses and capital employed:—*Held*, that the defendants were partners in the business of carrying on the mine, and that their liability, as such, could not be affected by evidence on their part denying the existence of a partnership or authority on the part of either to bind the other. *Montagu School Trustees v. Oland*, 35 N. S. Reps. 409.

**5. Public schools — Selection of school site — Trustees — Ratepayers—Difference — Award — Invalidity — Mandamus — Estoppel.]**—It is only in case of a difference between the trus-

tees, on the one hand, and a majority of the ratepayers at a special meeting, on the other, as to a school site selected by the trustees, that an arbitration is to be had, under s. 31 of the Public Schools Act, R. S. O. 1897 c. 292.—And where a majority of the ratepayers at a special meeting voted in favour of a change of school site, without any selection of site having been first made by the trustees:—*Held*, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner prescribed by s. s. 2, whether such award was or was not valid on its face, was an absolutely void proceeding, and no answer to a motion by the trustees for a *mandamus* to the corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house in pursuance of the vote of the ratepayers.—*Quære*, whether the award was valid on its face, inasmuch as it did not shew a difference between the trustees and the ratepayers. — *Held*, also, that there could be no estoppel against the applicants, or waiver of the public right.—Judgment of a Divisional Court, 4 O. L. R. 272, affirmed. *In re Cartwright Public School Trustees and Township of Cartwright*, 23 Occ. N. 216, 5 O. L. R. 699.

See ARBITRATION AND AWARD. 1—ASSESSMENT AND TAXES, II. 2, 3. IV. 1—CRIMINAL LAW, II. 12 — MUNICIPAL CORPORATIONS, VIII. 1 — MUNICIPAL ELECTIONS, 6, 7, 8—WILL, II. 8.

## SCHOOL COMMISSIONER.

See NOTICE OF ACTION, 4.

## SCRUTINY.

See MUNICIPAL ELECTIONS, 3.

## SEAL.

See COMPANY, I. 1—CONTRACT, VIII. 2 —DISTRIBUTION OF ESTATES, 8.

## SEARCH WARRANT.

See MALICIOUS PROSECUTION, 5.

## SECURITY FOR COSTS.

See COSTS, VII.

**SEDUCTION.**

See CRIMINAL LAW, II. 13.

**SENTENCE.**

See CONSTITUTIONAL LAW, 10—CRIMINAL LAW, II. 16 — LIQUOR ACT OF ONTARIO, 1, 3—STATUTES.

**SEPARATION.**

See HUSBAND AND WIFE, VII., VIII.

**SERVICE OF PAPERS.**

See BANKRUPTCY AND INSOLVENCY, I. 9—CHOSE IN ACTION, ASSIGNMENT OF, 4, 5, 6 — COMPANY, III. 10—CONTEMPT OF COURT, 3—DISTRIBUTION OF ESTATES, 6—EXECUTION, II. 8—HUSBAND AND WIFE, III. 2, VI. 1—OPPOSITION, 2 — PARLIAMENTARY ELECTIONS, II. 9, 10—PARTICULARS, 8—PARTIES, 2, 11—PATENT FOR INVENTION, 3—PEREMPTION—PLEADING, IV. 1—WRIT OF SUMMONS, I.

**SET-OFF.**

**Goods sold — Damages for short delivery — Cross-demand — Pleading.]**—In an action for goods sold and delivered, the defendant cannot plead set-off of damages alleged to have been suffered by him in consequence of the plaintiff's default to complete delivery of the whole quantity of goods stipulated in the contract. Such claim should be urged by cross-demand. *Walshaw v. Rosenfield*, Q. R. 24 S. C. 80.

See APPEAL, VII. 2—ATTACHMENT OF DEBTS, II. 4—COSTS, IV., VI. 10—DEFAMATION, II. 1—PLEADING, VII. 4.

**SEWERS.**

See MUNICIPAL CORPORATIONS, III. 2, XI. 2.

**SHARES AND SHAREHOLDERS.**

See BUILDING SOCIETY — COMPANY, II. —RECEIVER.

**SHERIFF.**

**1. Bond — Predecessor in office — Annuity out of revenues.]**—Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay him an annuity "out of the revenues of the said office:" — *Held*, that fees received by the sheriff as returning officer at elections of members of Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that, as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during that year, the annuity for that year was payable. *Smart v. Dana*, 23 Occ. N. 170, 5 O. L. R. 451.

**2. Capias — Gaol — Mileage.]**—A sheriff is required to safely keep a person arrested on a *capias*, and, as there is no common gaol in Vancouver, the sheriff of Vancouver is entitled to lodge a person arrested in his bailiwick in New Westminster gaol and charge mileage therefor. *Carson v. Carson*, 10 Brit. Col. L. R. 83.

**3. Fees — Resale on false bidding.]**—When a property is resold upon false bidding, the sheriff is only entitled to one commission and tax, as if there had been but one sale. *Nieuwenhuyse v. Town of Farnham*, 5 Q. F. R. 160.

**4. Fees—Seizure of land under execution — Division into lots.]**—An immovable, within the meaning of Art. 706, C. P. C., does not necessarily mean a cadastral lot, but an exploitation; and an immovable composed of several lots upon the official plan and book of reference constitutes, notwithstanding, only one immovable if it constitutes only a single exploitation.—2. Article 7 of the tariff of fees for sheriffs, allowing an additional fee for every additional lot seized, must be interpreted as referring to Art. 6 of the same tariff and as meaning every additional immovable; so, if the bailiff has grouped several lots according to their respective situations to constitute different immovables, the sheriff can charge an additional fee only for each group or additional immovable. *Gault v. Dufort*, Q. R. 24 S. C. 77, 5 Q. P. R. 353.

**5. Poundage — Money paid before sale — Possession money.]**—Where a sheriff made a seizure under writs of *fiat facias* of property of the judgment debtor, and a few hours before the sale the judgment debtor came to the sheriff and paid the full amount of the judg-

ment debt:—*Held*, that the sheriff was entitled to poundage on the full amount of the judgment debt, and not merely on the value of the property seized:—*Held*, also, that under the circumstances of this case \$2.25 per day was not too much to allow for possession money. *In re Black Eagle Mining Co.*, 23 Occ. N. 331, 6 O. L. R. 512.

See ARREST, I.—ATTACHMENT OF DEBTS, II. 10—DISCOVERY, I. 1—EXECUTION—LIEN, 4—MINES AND MINERALS, 4—OPPOSITION, 3—PARLIAMENTARY ELECTIONS, II. 12—REGISTRY LAWS, 2—TRIAL, II. 9.

## SHIP.

- I. CHARTERPARTY.
- II. COLLISION.
- III. JUDICIAL SALE.
- IV. PILOTAGE DUES

See NEGLIGENCE, 4—REVENUE, 1.

### I. CHARTERPARTY.

**1. Duty of charterer—Time — Insurance — Place of loading — Terms of contract — Custom of port — Measure of damages.**—The plaintiffs, being the owners of a vessel called the Midland Queen, agreed by telegram with the defendants to carry a cargo of wheat from F. W. to G. at four and a half cents a bushel, confirming it as follows: "We confirm Midland Queen four and a half G. load F. W. on or before noon fifth December."—The wheat was in the elevators at F. W., and the Midland Queen arrived in that harbour on the 3rd December, but, as several vessels had arrived before her, and she had to take her turn to get to the elevators according to the regulations of the owners of the elevators there, of which all parties were aware, she was not loaded by the time fixed, and had to leave for home without a cargo in order to save her insurance:—*Held*, that the defendants' duty was to furnish a cargo at the elevators, the only place of loading at F. W., and the contract should be read as if the words "at the usual place" were inserted; and that the plaintiffs' contract was to proceed to the usual place of loading, receive the cargo, and carry it to the point of destination; that the loading was to be done by noon of the 5th; that the defendants not having done anything to obstruct the vessel in getting to the elevators, and the plaintiffs having failed to shew that the de-

fendants were in default, their action should be dismissed; and that the vessel not having arrived sufficiently in advance to secure her turn in time, the defendants were entitled to such damages as fairly resulted from the breach of contract and were in contemplation of the parties; and these damages were to be measured by the injury suffered by the cargo being left on the defendants' hands. *Midland Navigation Co. v. Dominion Elevator Co.*, 23 Occ. N. 319, 6 O. L. R. 432.

**2. Foreign vessel — Necessaries— Authority of master — Liability of owners.**—Action against a foreign vessel and owners for necessaries supplied at a Canadian port to the vessel, which was under charter, the possession and control of the vessel being by the charterparty transferred to the charterers, who appointed the master, and he for them the crew, and who paid their wages and the running and other expenses of the vessel. The plaintiff knew that the vessel was under charter, but not the terms of the charterparty. The trial Judge found, on conflicting testimony, that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor:—*Held*, that the plaintiff ought to have the benefit of the finding in his favour, but, as the master was the servant of the charterers and not of the owner, he had no authority to pledge the latter's credit, and, as the owner was not liable, the vessel was not. *The "David Wallace" v. Bain*, 23 Occ. N. 103, 8 Ex. C. R. 206.

### II. COLLISION.

**1. Liability—Imperial regulations.**—In a collision in Canadian waters between the steamship W. and the schooner M. A., the W. was found to be at fault in a matter that occasioned the collision. It was also found that the M. A. had contravened the regulations for preventing collisions in Canadian waters; but that such contravention did not contribute to the accident. In an action against the W. by the widow and universal legatee of the owner of the M. A.:—*Held*, that the W. alone was to blame, and that the plaintiff was entitled to recover.—2. Where a collision occurs on the high seas, and the provisions of s. 419 of the Merchants Shipping Act, 1894, and the Imperial regulations for preventing collisions at sea, are in force, the obligation is imposed on a vessel that has infringed a regulation which is *prima facie* applicable to the case, to prove, not only



that such infringement did not, but that it could not, by any possibility, have contributed to the accident; but when the collision occurs in Canadian waters, and the Act respecting the navigation of Canadian waters, R. S. C. c. 79, and the regulations for the prevention of collisions made by the Governor-General in council, are in force, the vessel which contravenes one of them will not be held to be in fault unless such contravention has contributed to the collision. *The Cuba v. McMillan*, 26 S. C. R. 661, referred to. *Hamburg Packet Co. v. Desrochers*, 23 Occ. N. 214, 8 Ex. C. R. 263.

**2. Navigation—Narrow channels—***"White Law," Rule 24—Right of way.*—Rule 24 of the "White Law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."—*Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned, but applies only to meeting vessels. Therefore, a steamer descending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.—The "*Shenandoah*" with a tow was ascending the St. Clair river in a fog and hugging the United States shore; the "*Carmona*" was coming down the river; and they sighted each other when a few hundred yards apart. They simultaneously gave the port signal, which was repeated by the "*Carmona*." The "*Shenandoah*" then gave the starboard signal, and steered accordingly. The "*Carmona*," thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "*Shenandoah*," but on going ahead again collided with the vessel in tow.—*Held*, reversing the judgment of a local Judge, 8 Ex. C. R. 1, that the "*Shenandoah*" was not in fault; but that, as the local Judge had found the "*Carmona*" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels, was committed while in the agonies of collision, the judgment as to her should be affirmed. *Davidson v. Georgian Bay Navigation Co.*, 23 Occ. N. 79, 33 S. C. R. 1.

**3. Right of way.**—In the case of a river traversed annually by thousands

of vessels and used by two nations, a custom which in effect supersedes a statutory rule ought to be established by the most conclusive and cogent proof; and when it is sought to make it binding on foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed among mariners generally, and extended to mariners sailing on vessels carrying a foreign flag and habitually traversing a busy river. *Georgian Bay Navigation Co. v. The "Shenandoah"* and *The "Crete"*, 8 Ex. C. R. 1.

**4. Ship at anchor—Anchor light—Lookout—Findings—Negligence.**—Judgment appealed from, 7 Ex. C. R. 408, affirmed. *Dominion Coal Co. v. The "Lake Ontario"*, 23 Occ. N. 33, 32 S. C. R. 507.

**5. Undue speed—Navigation during fog.**—Judgment appealed from, 7 Ex. C. R. 390, 22 Occ. N. 129, varied; GIBOUARD, J., dissenting. *The "Pawnee" v. Roberts*, 23 Occ. N. 33, 32 S. C. R. 509.

### III. JUDICIAL SALE.

**1. Purchaser refusing to complete—Resale—Liability of purchaser for difference in price—Statute of Frauds.**—A ship was sold at auction by the marshal under an order of Court in an action for seamen's wages. The ship was knocked down to J. for \$2,000. J. refusing to complete the purchase, the ship was resold by the marshal for \$1,900.—*Held*, that J. was liable for the difference in price and the costs occasioned by his default.—2. Judicial sales are not within the Statute of Frauds, and therefore no memorandum in writing of the sale to J. was necessary. *Attorney-General v. Day*, 1 Ves. Sr. 218, referred to.—3. For the purpose of establishing J.'s liability, an order for resale was not necessary. *Hackett v. The "Blakeley"*, *In re Jones*, 8 Ex. C. R. 327, 9 Brit. Col. L. R. 430.

**2. Seizure by ordinary creditor—Rights of hypothecary creditors—Sale subject to hypothecs—Consent—Order.**—An hypothecated vessel cannot, to the prejudice of the hypothecated creditor and without his consent or the order of a competent Court, be seized at the suit of an ordinary creditor of the owner of the vessel.—2. The fact that an ordinary creditor has advertised the sale of such a vessel subject to all registered hypothecs is not sufficient to relieve him from obtaining such consent or such order. *Daigneault v. Brûlé*, Q. R. 22 S. C. 20.

## IV. PILOTAGE DUES.

**1. Exemption—Statute.]**—Under the terms of the Pilotage Act, R. S. C. c. 8, s. 59, as amended by the Acts of 1900, c. 36, s. 14, the following ships, called "exempted ships," are exempted from the compulsory payment of pilotage dues: "(c) Ships employed in trading . . . between any one or more of the Provinces of Quebec, New Brunswick, Nova Scotia, or Prince Edward Island, and any other or others of them, or employed on voyages between . . . any port in any of the said Provinces and any port in Newfoundland," etc.:—*Held*, that a ship employed on a sealing voyage from Halifax to the Newfoundland seal fisheries and back, calling on her outward voyage at Louisbourg for coal, and at a port in Newfoundland for men and supplies, and again at Newfoundland, on her return, to dispose of her catch, was not an exempted ship within the terms of the Act.—*Semble*, that what was contemplated by the Act, in providing for exemptions, was lines of steamers, or even one steamer, making regular periodical voyages, with termini as indicated in the Act, either throughout the year or during a certain season of the year. *Farquhar v. McAlpine*, 35 N. S. Reps. 478.

**2. Liability of barge** — "*Every ship which navigates.*" ] — *Held*, affirming the judgment of the local Judge for the Quebec Admiralty District, that the expression "every ship which navigates," found in s. 58 of the Pilotage Act, R. S. C. c. 80, means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means and which must be moved or propelled or navigated by another vessel. *Corporation of Pilots for the Harbour of Quebec v. The "Grande,"* 22 Occ. N. 428, 8 Ex. C. R. 54, 79.

## SHOPS.

See MUNICIPAL CORPORATIONS, I. 2.

## SHORT FORMS ACT.

See MORTGAGE, 4.

## SLANDER.

See DEFAMATION, II.

## SMALL DEBTS COURT, B. C.

See COURTS, II.

## SOLICITOR.

**1. Authority — Ratification—Right to recover costs.]**—A piano belonging to the defendant having been seized in the possession of one H., the plaintiffs, advocates, upon instructions received from H., who alleged that he was authorized by the defendant, made, in the name of the latter, an opposition demanding the withdrawal of the piano from the seizure which had been made. The defendant's agent, having learnt that the opposition had been filed, went to the office of the plaintiffs and told them that he would not pay the costs of it, but did not order them to discontinue the proceedings, and, the opposition having been maintained, he re-took his piano: — *Held*, that, in these circumstances, the defendant was liable to pay the plaintiffs the costs of the opposition. *Semble*, that the defendant, if he wished to avoid the payment of the costs, should have disavowed the proceedings taken in his name. *Detisle v. Lindsay*, Q. R. 23 S. C. 313.

**2. Bill of costs—Acquiescence—Revision.]**—A party who pays under protest a bill of costs, after having discussed it and obtained several reductions, will be held to have acquiesced in it, and cannot afterwards demand the revision of it. *Beaudoin v. Lamothe*, 5 Q. P. R. 358.

**3. Distraction of costs — Foreign law — Code of Civil Procedure in Quebec — Recovery of costs — Interest.]** — "Distraction of costs," as provided for in s. 553 of the Code of Civil Procedure in the Province of Quebec, is the diverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled. — The plaintiffs were the attorneys on the record for one R., against whom an action was brought in the Province of Quebec by the defendant, and an interlocutory motion therein had been dismissed with costs, taxed at \$238.20, and judgment entered therefor in the Superior Court at Montreal:—*Held*, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario, without the intervention of their client.—*Quare*, as to interest on the account. *Hutchinson v. McCurry*, 23 Occ. N. 111. 5 O. L. R. 261.

**4. Lien for costs—Charging order—Lands in question in redemption suit—Registry of lis pendens—Discharge of.]**

—Rule 1129, which empowers the Court or a Judge to declare that a solicitor, who has been employed to prosecute or defend any case, etc., shall have a lien on the property recovered or preserved through his instrumentality, is construed liberally, so as not to deprive the solicitor of his lien.—A *lis pendens* registered by the solicitor against land, the subject matter of a redemption action, wherein costs were incurred by the solicitor, will not be discharged on a motion therefor in Chambers, but will be left for the decision of the trial Judge after the hearing of the evidence. *O'Flynn v. Middleton*, 23 Occ. N. 230, 5 O. L. R. 621.

**5. Readmission to practice.]**—A solicitor who had abandoned practice for more than five years was readmitted by the Court upon passing an examination to the satisfaction of the council of the barristers' society of New Brunswick. *In re Deacon*, 36 N. B. Reps. 3.

**6. Remuneration for services out of Court**—*Quantum meruit*—*Percentage.*]—The services of an attorney in procuring an option on and the purchase of an immovable, for a client, are purely a matter of *quantum meruit*, which the Court will fix at 5 per cent. upon the price. *Aylen v. Lindsay*, Q. R. 23 S. C. 345.

**7. Retainer—Evidence of.]**—A commencement of proof by writing is not necessary in order to allow an advocate to prove a retainer. *Mirault v. Bissonnette*, Q. R. 24 S. C. 25.

**8. Retainer—Termination of—Costs subsequent to judgment—Limitation of actions.]**—The employment of a solicitor to bring or defend an action, subject possibly to his right to claim payment of his costs on judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solicitor's duty under his retainer to do for his client's protection; and even, in the absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings consequent upon the judgment, there is a continuation of such original contract.—Where, therefore, after the giving of judgment in an interpleader issue, the solicitor for the defendant, against whom judgment had been given, continued, with the client's knowledge, to act for him in the taxation of the plaintiff's costs, and in the preparation and taxation of certain bills which the defendant was entitled to set off, his appointment continued until the completion of those pro-

ceedings, so that as against a claim for the amount of his bill of costs, the Statute of Limitations began to run only from the date of such completion. *Millar v. Kanady*, 5 O. L. R. 412.

See APPEAL, VI. 1—BANKRUPTCY AND INSOLVENCY, I. 7—CHOSE IN ACTION, ASSIGNMENT OF, 1—COSTS—COURTS, II. —CROWN, IV. 2—DESISTMENT, 2—GIFT, 4—MALICIOUS PROSECUTION, 3—MUNICIPAL CORPORATIONS, X. 1—OPPOSITION, 11—PARTNERSHIP, 1—PEREMPTION, 4, 5—PLEADING, VII. 5—PROCURATION—WILL, III. 2—WRIT OF SUMMONS, I. 1, 12.

## SPECIAL CASE.

See COSTS, I. 6.

## SPECIFIC PERFORMANCE.

**1. Contract for sale and purchase of land—Agent of purchaser—Action by agent—Delay of purchaser—Resale—Right of sub-purchaser to join vendor as party.]**—Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract.—Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude, upon pain of losing them.—The owner of land of that character on the 1st May, 1900, contracted to sell it to H., but was never paid anything upon the purchase money, although \$50 was to be paid down, and \$200 in six months, to be secured by H.'s note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff acting for an unnamed principal, and the owner was willing to carry out the resale:—*Held*, that the whole course of proceedings on the part of the plaintiff's principal (set out in the case) shewed that he had been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate; and the action should be dismissed as against both defendants:—*Held*, that the owner was properly joined as a defendant; the foundation of the right against him being that the plaintiff or his principal

was the equitable owner under his contract with H. of H.'s rights against the owner of the land, and might join the latter upon offering to perform H.'s contract. *Smith v. Hughes*, 23 Occ. N. 108, 5 O. L. R. 238.

**2. Contract for sale and purchase of land—Bill of complaint—Allegation of tender — Demurrer — Evidence.]**—Where in a suit for specific performance of an agreement for the sale of land, the question whether the plaintiff had made a tender of the purchase money within the time limited by the agreement was one of evidence, a demurrer to the bill on the ground that it did not allege a tender in time was overruled. *Stewart v. Freeman*, 22 Occ. N. 399, 2 N. B. Eq. Repts. 408.

**3. Contract for sale and purchase of land—Judgment for payment of price — Extension of time—Payment on account — Liquidated damages—Forfeiture — Relief against.]**—After judgment in an action by the vendors of land for specific performance, and before issue of the same, the vendors agreed to extend the time for the payment of the purchase money for three months, upon the terms of the purchaser paying down \$500; which extension was embodied in the judgment, and it was agreed between the parties as follows: "If the defendant shall pay the balance of the purchase money within the time limited by the judgment, the plaintiffs shall give credit to the defendant upon the said balance for the said sum of \$500, but, if the defendant shall fail to make payment of the said balance within the time limited by the said judgment, then the plaintiff shall not be bound to give credit to the defendant upon the said balance for the said sum of \$500, and in this respect time shall be of the essence of the contract."—A few days after the expiry of the time limited by the judgment, the defendant tendered the purchase money, less \$500, which the plaintiffs refused to accept:—*Held*, that the above provision was in the nature of a forfeiture, and not of liquidated damages, and the purchaser was entitled to be relieved from the terms of the judgment and to have a conveyance of the property upon paying the balance due after credit given for the \$500. *Empire Loan and Savings Co. v. McRae*, 23 Occ. N. 229, 5 O. L. R. 710.

**4. Contract for sale and purchase of land—Oral contract—Statute of Frauds—Part performance — Possession—Note or memorandum—Delivery of deed in escrow.]**—Specific performance of an oral contract for the sale and purchase of land was adjudged at the suit of

the vendee, who had gone into possession of the land on the faith of the contract and openly and continuously for some time remained in visible possession by his tenants, to the knowledge of the vendors and without objection on their part. It was considered that, under the circumstances, possession should be assumed to have been taken with the assent of the vendors, and the possession was of such a character as to exclude the operation of the Statute of Frauds.—*Quære*, whether a conveyance of land defectively executed and delivered in escrow and retained in the vendor's own possession, to be handed to the vendee on payment of the purchase money, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed. *McLaughlin v. Mayhew*, 23 Occ. N. 277, 6 O. L. R. 174.

**5. Contract for sale and purchase of land — Taking possession—Acts constituting part performance.]**—Possession is part performance of a contract for the sale and purchase of land both by and against a stranger and the owner.—On negotiations for the purchase of land the agent of the plaintiff, vendor, told the defendant, purchaser, that the lot was his. The defendant went on and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase:—*Held*, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to the usual judgment for specific performance. *Bodwell v. McNiven*, 23 Occ. N. 107, 5 O. L. R. 332.

See MUNICIPAL CORPORATIONS, III. 1 — RAILWAY, I. 2 — VENDOR AND PURCHASER.

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**STATUTE OF LIMITATIONS.**

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**STATUTES.**

**Imperative provisions**—"Is hereby authorized"—"May"—*Boys' Industrial Home—Warrant of chairman—Custody of boy convict—Establishment of home as prison—Dominion statute—Intra vires—Certificate of sentence.*—In an application for a mandamus to the chairman of the Boys' Industrial Home to compel him to issue his warrant to deliver to the custody of the superintendent a boy sentenced to a term of imprisonment in the home under 56 V. c. 33 (D.), it appeared that s. 6 of the Act authorizing the gaoler to retain the boy "until there is presented to such gaoler a warrant from the chairman of the governing board (which warrant the chairman is hereby authorized to issue under his official seal) requiring the sheriff or constable or other officer to deliver such boy to the superintendent of such industrial home;" and that s. 9 of 56 V. c. 16 (N. B.) says "the said chairman may thereupon (referring to what shall precede the issuing of the warrant) issue his warrant," etc.:—*Held*, that the words "is hereby authorized" in s. 6, and "may" in s. 9, are not only enabling words but imperative as well, and the chairman has no discretionary power as to the issue of the warrant. — That the Dominion Act establishing the home as a prison, is not *ultra vires*.—That the chairman was not justified in refusing to issue the warrant because the certificate of sentence did not contain all the items of information specified in schedule A of the Provincial Act. *Ex p. The Attorney-General, In re Goodspeed*, 36 N. B. Repts. 91.

See ASSESSMENT AND TAXES, V., VII.  
2—BANKRUPTCY AND INSOLVENCY, I. 16

—BILLS OF EXCHANGE AND PROMISSORY NOTES, 17 — COMPANY, IV. 1, 5—CONSTITUTIONAL LAW—CONTRACT, III. 1—COPYRIGHT, 2, 6—CRIMINAL LAW, I. 1—CROWN, IV. 1—EVIDENCE, III.—FIXTURES, 2—GIFT, 1—INTEREST, 1—LIQUOR LICENSE ACT, III., VI. 1—MUNICIPAL CORPORATIONS, I. 1, 2, V. 2, VII. 2, VIII. 2—MUNICIPAL ELECTIONS, 7, 10—NUISANCE, 3—OPPOSITION, 1—PEREMPTION, 6—RAILWAY, III. 2, VII. 4, VIII. 1, 3—REFEREES AND REFERENCES, 1—REVENUE—SHIP, IV. 1—SUNDAY—WATER AND WATERCOURSES, 10.

**STAY OF PROCEEDINGS.**

**Several actions by different plaintiffs against same defendant**—*Consolidation.*—Twenty-nine actions having been brought by different persons against the defendant company for damages caused by the death of relatives in an explosion in the company's coal mine, and twenty-nine summonses for better particulars of the plaintiffs' claims having been dismissed, the defendants appealed:—*Held*, that the Court, by virtue of its inherent jurisdiction to prevent the abuse of its process, could and would, on the application of the defendants, stay proceedings in twenty-eight of the actions (upon defendants consenting to be bound in all the appeals by the result of one) until after the decision of the appeal in the remaining action—proper provision being made in case that appeal did not properly dispose of the questions in all.—The proper practice would have been to have applied to have the actions consolidated. *Bodi v. Crow's Nest Pass Coal Co.*, 9 Brit. Col. L. R. 332.

See APPEAL, X. 14—COMPANY, III. 11—CONTEMPT OF COURT, 3—COSTS, VIII. 3—DESISTMENT, 1—DISCOVERY, II. 6—INSURANCE, III. 1—LUNATIC, 3—PARLIAMENTARY ELECTIONS, II. 11—PEREMPTION, 8—PLEADING, IX. 2—REFEREES AND REFERENCES, 3.

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See REVENUE, 3.

**STOLEN PROPERTY.**

See CLUB.

**STREET.**

See WAY.

**STREET RAILWAYS.**

**1. Contract with corporation — Construction of contract — Snow and ice.**—The city council of Montreal being bound as the road authority to remove the ice and snow on the street from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the sidewalks:—*Held*, that the respondent street railway company, having contracted with the city to keep their track free from snow and ice, did not, having regard to the surrounding circumstances, and in the absence of words expressly forbidding it, commit a nuisance by sweeping their snow into the street. *Ogston v. Aberdeen District Tramways Co.*, [1897] A. C. 111, distinguished:—*Held*, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers. Judgment in *Q. R. 11 K. B.* 458 affirmed. *City of Montreal v. Montreal Street R. W. Co.*, [1903] A. C. 482.

**2. Negligence—Injury to passenger —Car running backwards — Jury — Answers to questions.**—The plaintiff was injured by a wagon in which he was being driven being struck by an electric car of the defendants which was running backward in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed:—*Held*, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question.—*Per ARMOUR, C.J.O.*—Questions to the jury must be in writing.—*Per OSLER, J. A.*—While it is more convenient that

questions to the jury should be in writing, the Judge is not bound to adopt that course. *Balfour v. Toronto R. W. Co.*, 23 Occ. N. 241, 5 O. L. R. 735.

**3. Negligence—Injury to passenger —Conductor attempting to pull passenger on moving car — Scope of authority— Question for jury — New trial.**—The plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down, but did not stop, and, as it was passing, the conductor seized the plaintiff's hand, and, while attempting to help her on board, signalled the car to go on again, which it did, and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—*Held*, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it is slowing up; that the question as to the scope of the conductor's authority is one of evidence; that there was evidence to go to the jury, and the effect of it was for them to consider; and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. *Dawdy v. Hamilton, Grimsby, and Beamsville R. W. Co.*, 23 Occ. N. 44, 5 O. L. R. 92.

See PARTIES, 7—WAY, I. 3.

**SUBROGATION.**

**Hypothec — Payment — Tiers-detenteur — Registration — Mistakes of registrar.**—*E.* on the 13th May, 1893, hypothecated to *O.* lots 87, 119, 130, and 132. Subsequently *A.* became *tiers-detenteur* of 87 and half of 132. Later *J.* became *tiers-detenteur* of 119 and 130 and the other half of 132. Neither *A.* nor *J.* was bound to pay the claim of *O.* On 22nd April, 1899, and 12th February, 1900, *J.* borrowed \$500 from *E.* and hypothecated to him the lands of which he was *tiers-detenteur*. On 9th November, 1901, in order to obtain legal subrogation, *E.* paid the claim of *O.*, who gave him a quitance and granted him conventional subrogation. On 23rd November, 1901, *A.* sold the lands of which he was *tiers-detenteur* to *M.*, and charged upon the purchase price the payment of *O.*'s claim, to which *E.* was subrogated. On 26th November, 1901, to comply with this obligation, *M.* paid to *E.* the *O.* claim and obtained a quitance, which stated that the payment was made out of the purchase money due to *A.* and

in accordance with the terms of the sale, and that it was a general and final quit-  
tance and for radiation of the hypothec.  
The lands of which J. was the *tiers-  
detenteur* were sold by the sheriff, and  
the proceeds were to be distributed:—  
*Held*, that the right and interest of A.  
(or of M.) to obtain legal subrogation  
was superior to those of E., for A. was  
interested in paying off the debt to free  
his land from the hypothec.—2. That A.,  
by this payment made by his purchaser  
out of the purchase money to E., had ob-  
tained legal subrogation in the O. claim,  
in spite of the terms of the quit-  
tance signed by E.—3. But that the lands of A.  
(sold to M.) being equally affected by the  
claim of O., A. could claim out of the  
proceeds of the sale of J.'s lands only  
a deduction of that portion of the O.  
claim which these lands should bear in  
proportion to their value; and such was  
the extent of the legal subrogation ob-  
tained by A.—4. That E., not being an  
assignee nor a subsequent subrogate,  
could not complain of the want of regis-  
tration of the legal subrogation obtained  
by A.—5. That the registrar's mistakes  
or irregularities or erroneous interpre-  
tation of documents regularly produced  
before him could not injuriously affect  
the rights of A.—6. That to obtain regis-  
tration of the quit-  
tance granted by E., it  
was sufficient to produce a copy of it to  
the registrar, which had been done, and  
the quit-  
tance shewed the legal subroga-  
tion. *Bélanger v. Boissonnault*, Q. R. 22  
S. C. 53.

See **BANKRUPTCY AND INSOLVENCY**,  
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### **SUBSTITUTION.**

See **EXECUTORS AND ADMINISTRATORS**,  
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**Lord's Day Act — Conviction —  
Farmer — *Ejusdem generis* rule.]—The  
Ordinance to Prevent the Profanation of  
the Lord's Day, C. O. 1898 c. 91, pro-  
vides:—(1) No merchant, tradesman,  
artificer, mechanic, workman, labourer,  
or other person whatsoever, shall on the  
Lord's Day sell or publicly shew forth  
or expose or offer for sale or purchase  
any goods, chattels, or other personal  
property, or any real estate whatsoever,  
or do or exercise any worldly labour,  
business, or trade of his ordinary calling,  
travelling or conveying travellers or Her  
Majesty's mails, selling drugs and medi-  
cines and other works of necessity and  
works of charity, only excepted:—*Held*,  
that the words "or other persons what-  
soever" are applicable only to persons  
who are *ejusdem generis* with those spe-  
cifically named, and do not include a  
farmer engaged in farm work. *Hamren  
v. Mott*, 5 Terr. L. R. 400.**

### **SUPERIOR COURT, QUEBEC.**

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### **SUPREME COURT OF BRITISH COLUMBIA.**

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**TENANTS IN COMMON.**

*Possession of one—Statute of Limitations — Fiduciary capacity — Acquiescence — Partition.*—An action for partition of land was resisted by the heirs, etc., of D., on the ground that she had acquired title by exclusive possession against the other tenants in common. The trial Judge found, and the evidence supported such finding, that D. acted throughout in a fiduciary capacity, as administratrix for the benefit of her father's estate, and those interested in it:—*Held*, that it was not open to a person in the position of D. to avail herself of the Statute of Limitations.—As the plaintiffs believed that D. was acting within her rights as administratrix, there was nothing in their conduct that would operate as a bar to the relief sought on the ground of acquiescence.—The acts of D., leasing the property, collecting rents, etc., which were relied upon as giving her an exclusive title, were perfectly consistent with the rights of the plaintiffs as tenants in common. *Brown v. Dooley*, 36 N. S. Reps. 56.

See PARTITION, 2.

**TENDER.**

*Bank notes.*—A tender in bank notes is good, though the notes are not legal tender, if the tender is not objected to on that account. *Stewart v. Freeman*, 23 Occ. N. 157, 2 N. B. Eq. Reps. 451.

See CONSTITUTIONAL LAW, 8—LIQUOR LICENSE ACT, IV.—MORTGAGE, 2—SPECIFIC PERFORMANCE, 2 — VENDOR AND PURCHASER, 2.

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See LIEN, 2, 3.

**THRESHING.**

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**TIMBER.**

**Driving logs — Injury to land — Damages — Misdirection — Employment of contractor — Vis major.**—In an action for damages for injuries to the plaintiffs' land by logs which the defendant had neglected to confine within his boom, and which were suffered to be driven up and down stream by the tide, the trial Judge instructed the jury that in assessing damages they were not restricted to the actual damage referred to in the statute (R. S. N. S. c. 95, s. 17), but, at the same time, the amount allowed ought to be reasonable:—*Held*, that the jury should have been told, at the same time, that the actual damage was, as a rule, the measure in common law actions of this kind; but, as the amount awarded by the jury was small, and as there was evidence to support it, the misdirection, if any, occasioned no substantial wrong or miscarriage, and was, therefore, within O. xxxvii., r. 6.—*Quere*, whether the defendant could escape liability by employing a contractor to bring down his logs, when, in the ordinary course of things, they would necessarily come in contact with the plaintiffs' land.—*Semle*, that he could not.—

In respect to a portion of the damage done, the defendant relied upon a plea of *vis major*:—*Held*, that this was not a defence unless the defendant could shew that the damage would equally have happened if he had done his duty:—*Held*, that, in this case, the excuse was insufficient, a larger quantity of logs having been brought down the stream in the expectation that, before the high tides came, a sufficient quantity could be sawed to enable the remainder to be confined within the boom, and the high tides having occurred two or three days earlier than the defendant expected, as the result of which the logs not confined in the boom were carried up the stream and stranded on the plaintiffs' land. *Campbell v. Dickie*, 36 N. S. Reps. 40.

See INDIAN LANDS — INJUNCTION, 3 — NEGLIGENCE, 5—SALE OF GOODS, III. 2—TRESPASS TO LAND, 2 — WASTE — WATER AND WATERCOURSES, 8.

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**TITLE TO LAND.**

See APPEAL, IX. 2—TRESPASS TO LAND.

**TOLLS.**

See CONSTITUTIONAL LAW, 3—WATER AND WATERCOURSES, 4—WAY, II. 3.

## TORONTO GAS COMPANY.

See COMPANY, IV. 5.

### TRADE MARK.

#### 1. Infringement — "Cream yeast"

—*Trade name — Acquisition of right by user.*]—The plaintiff in 1877 obtained the registration of a trade mark for a certain kind of yeast which he manufactured and sold, and in 1894 obtained another registration of the same. It consisted of a label bearing the representation of the head and bust of a woman, with the words "Dry" and "Hop" on either side, and the words "Cream Yeast" below. In 1901 the defendant commenced selling yeast cake in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between. The plaintiff did not use cream in the preparation of his yeast, but the defendants actually used Jersey cream in theirs: — *Held*, that the plaintiff's trade mark, if he was entitled to register it, was not infringed by the defendants' label:—*Held*, also, reversing the decision of STREET, J., 4 O. L. R. 300, that the plaintiff had not acquired the exclusive right to use the name "Cream Yeast," and was not entitled to have the defendants restrained from using it. *Gillett v. Lumsden*, 23 Occ. N. 259, 6 O. L. R. 66.

#### 2. Infringement—Geographical description — Alien — Competition.]—

An alien has an action in the Province of Quebec to prevent unfair competition in trade.—2. An unregistered trade mark is only entitled to protection where there is unfair or fraudulent competition, and damage is caused to the proprietor of such mark.—3. Unfair competition does not exist where confusion of marks is not possible. So, in the present case, the adoption by the defendants of the name "Milwaukee" to describe their lager beer, made in Montreal, having preceded by ten years the introduction of the plaintiffs' lager beer in the Canadian market, and there being no proof of deception or damage, the defendants using a different label containing the word "Montreal," the plaintiffs were not entitled to an injunction to restrain the use of the word "Milwaukee" in connexion with the sale, etc., of the Canadian article. Judgment in Q. R. 20 S. C. 20 reversed. *Pabst Brewing Co. v. Ekers*, Q. R. 22 S. C. 545.

#### 3. Infringement — Injunction — Security.]—

The owner of a trade mark,

who complains that his orders for sales of an article covered by the trade mark are filled by the sending of an article covered by the defendant's trade mark, and that the resemblance between the two marks is such that it may induce error in purchasing, has the right to an interlocutory injunction upon furnishing security. *Lefebvre v. Landry*, 5 Q. P. R. 341.

4. Infringement — Representations of the King and the royal arms—*User before registration—Declaration signed by agent.*]—A label, as applied to boxes containing cigars, bearing upon it in an oval form a vignette of King Edward VII., with a coat of arms on one side, and a marine view on the other, surmounted by the words "Our King," and with the words "Edward VII." underneath, constitutes a good trade mark in Canada, and may be infringed by the impression, upon boxes containing cigars, of a fac-simile of the royal arms surmounted by the words "King Edward."

—2. The English rule prohibiting the use of the royal arms, representations of His Majesty, or of any member of the royal family, of the royal crown, or the national arms or flags of Great Britain, as the subjects of trade marks, is not in force in Canada.—3. It is not essential to the validity of a trade mark registered in Canada that the person registering the same should have used it before obtaining registration. The registration must, however, in such a case, be followed by use, if the proprietor wishes to retain his right to the trade mark. In this respect there is no difference between the law of Canada and the law of England.—4. The declaration required from the proprietor of a trade mark by s. 8 of the Trade Marks and Design Act, R. S. C. c. 63, may be signed by his duly authorized attorney or agent. *Spilling v. Ryall*, 23 Occ. N. 102, 8 Ex. C. R. 195.

#### 5. Registration — Words — Device

—*Resemblance — First user — Declaration — Truth of — Expunging mark.*]—Registration of a trade mark to be applied to the sale of whisky was refused, on the ground that it too closely resembled trade marks previously registered. The earlier ones consisted in the representation of a maple leaf and such words as "Old Red Wheat," "Early Dew." The later one consisted of the words "Maple Leaf" and the device of a maple leaf on which was impressed the figure of a beaver, used separately or in conjunction with the words "Fine Old Rye Whisky," etc.—2. A declaration made by the respondents that they believed a certain trade mark was theirs on account of their having been the first to use it, being true when made, and they

having afterwards, when they learned of one J. C.'s registered trade mark, purchased it from him, the petitioners were not entitled to have the respondents' trade mark expunged, on the ground that their declaration was untrue.—3, In 1902, after the controversy between the parties had arisen, and without notice to the petitioners, the respondents obtained registration of another specific trade mark to be applied to the sale of whisky, which consisted of the words "Maple Leaf" and the representation of a maple leaf:—*Held*, that the registration should be expunged. *Meagher v. Hamilton Distilling Co.*, 8 Ex. C. R. 311.

See PLEADING, I.

## TRADE NAME.

**Infringement** — "*Caledonia water*" — "*Caledonia mineral water*" — *Geographical designation*.] — The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, respecting the waters of which they had caused to be registered certain trade marks, and the names "*Caledonia water*" and "*Caledonia mineral water*." The water, which was used medicinally and as a beverage, had, through the plaintiffs' exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs, and near the springs a village, laid out on the ground many years before, had actually come into existence, where the plaintiffs had erected an hotel, and had procured a railway station and post office to be erected under the name "*Caledonia Springs*." In 1898 L. & Co., who had purchased a lot about a quarter of a mile distant from the plaintiffs' place, had, by sinking an artesian well, tapped springs, from which water flowed, similar in some respects to the plaintiffs', which they supplied in barrels to their agents, as "water from the new springs at Caledonia," which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiffs'. One of the agents, T. & Co., had, at the time of the commencement of the action, been using labels thereon resembling the plaintiffs', and selling the water as Caledonia water, but this had never been sanctioned by L. & Co., and was at once abandoned:—*Held*, reversing the judgment in 21 Occ. N. 524, 2 O. L. R. 322, that the defendants could not be restrained from using the word "*Caledonia*" as they did in designating the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co., and as against them the

plaintiffs should only be allowed the costs of entering judgment by default. *Grand Hotel Co. of Caledonia Springs v. Wilson*, *Grand Hotel Co. of Caledonia Springs v. Tune*, 23 Occ. N. 82, 5 O. L. R. 141.

## TRADE UNION.

**1. Fees of members—Arrears—By-laws—Penalty for infraction.**] — By their charter the plaintiff association have power to impose by by-law the payment of an annual fee by each of their members, and also a penalty for every infraction of their by-laws. The association, in pursuance thereof, passed a by-law fixing the membership fee at \$2 a year and imposing a penalty of \$10 for every infraction of the by-laws. The defendant took out his license, and paid his fee for one year, and afterwards exercised his trade for three years without paying his fee:—*Held*, that, in the circumstances, the plaintiff association could claim from the defendant only the penalty which he had incurred for the infraction of the by-laws, and not the arrears of his fees. *Barbers' Association of the Province of Quebec v. Charlebois*, Q. R. 23 S. C. 287.

**2. Inducing breach of contract—Interference with business—Foreign officer—Incorporation—Pleading.**] — Damages are recoverable against a trade union and the members thereof in an action by employers of workmen when, by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers, and other workmen are prevented from entering into the employment in their stead.—And a foreign officer of an organized body of which the local trade union was a part, who came to this Province and aided, encouraged, and directed the members in their unlawful acts, was held liable with them for the consequences. — It is too late at the trial, after a trade union has appeared and pleaded in an apparently corporate capacity, to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded. *Krug Furniture Co. v. Berlin Union of Amalgamated Woodworkers*, 23 Occ. N. 170, 5 O. L. R. 463.

See CONSPIRACY—PARTIES, 8—PLEADING, X. 1—WRIT OF SUMMONS, I. 4.

## TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, XV.

**TREATING.**

See PARLIAMENTARY ELECTIONS, III.

**TREATY.**

See EXTRADITION.

**TRESPASS TO LAND.**

**1. Action—Possession—Effect of enclosure by another.]**—The mere enclosure of the land of another, by the adjoining proprietor, by a fence put up with the consent of and by arrangement with the owner, for the purpose of protecting the lands of both against cattle, does not dispossess the owner, nor prevent him from maintaining trespass against anyone intruding therein, or using his land for purposes other than that for which it was enclosed. *Brookman v. Conway*, 35 N. S. Reps. 462.

**2. Cutting and removing timber—Measure of damages—Wrongful and wilful acts.]**—In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed.—Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only:—*Held*, that the damages should be measured by : (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants; (3) such further and other damage as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc. *Martin v. Porter*, 5 M. & W. 351, and *Bull's Coal Co. v. Osborne*, [1899] A. C. 351, applied and followed.—Decision of *LOURT, J.*, 22 Occ. N. 114, 3 O. L. R. 269, affirmed. *Union Bank of Canada v. Rideau Lumber Co.*, 23 Occ. N. 11, 4 O. L. R. 721.

**3. Defence—Expropriation—Plan—Description—Boundary line—Damages.]**—The defence in an action for trespass to land was that the land in question has been expropriated by the town of S. under the provisions of the Acts of the Province, 1889, c. 84, and conveyed

by the town to the defendant company.—The Act contained a provision that, upon the filing of a plan in the office of the registrar of deeds for the county, immediately after the town council should have by resolution provided for such expropriation, all right, etc., in said lands should forthwith absolutely vest in the town:—*Held*, that the filing of the plan would be ineffectual in the absence of a resolution of the town council providing for the acquisition or expropriation of the land; and that a description written on the face of the plan was made part of and must be taken in connection with it.—The defence to the action depended in part upon the position of the line between *McD.* and *McL.*:—*Held*, that the mode adopted by the defendant to fix the starting point of this line could not be adopted to the exclusion of all others, and to control the line as established by the vendors and purchasers at the times the conveyances were made, and not since disputed, especially as the effect would be to deprive the plaintiff of his land without proper notice, and without remuneration:—*Held*, with respect to damages, that though they were not such as the Court would have given, the matter was one in the discretion of the trial Judge, and there was no reason for interfering. *McLennan v. Dominion Iron and Steel Co.*, 36 N. S. Reps. 28.

**4. Possessory action—Disturbed possession—Prescription—Title—Intervention.]**—The plaintiff, by possessory action, complained of being troubled in his possession, by the defendants, of the rear portion of lots 2195 and 2196 of the cadastral plan of Three Rivers, extending from "la cime de la côte" to the river St. Lawrence.—The defendants pleaded ownership and possession under arrangements with the Crown.—The Canada Iron Furnace Company intervened, claiming ownership of the entire lot No. 2196 under a deed of sale of the 30th October, 1890, accompanied by constant possession for over ten years.—The plaintiff contested the intervention, alleging that the intervenants could only claim the extent of ground conveyed to their *auteur*, by sheriff's sale of the 15th February, 1862, and which extended only to the "cime de la côte," none of which is claimed by the action, the portion so claimed starting from the "cime de la côte" and going to the river.—The intervenants' title expressly covered all the land to the river, which is given both by the title and by the cadastral plan as the boundary thereof.—The intervenants were never troubled in their possession judicially, the only disturbance being a notarial protest by the plaintiff, more than a year and a day prior to the institution of this action, notifying the in-

tervenants that he claimed the land now claimed by his action, and requiring them to join in making a line fence along the "*côte de la côte*." This protest was not followed by any attempt to obtain possession of the land from the intervenants:—*Held*, that there was no *trouble de droit* of the intervenants' possession within ten years.—2. A notarial protest is not a *trouble de droit* of possession of land, and does not interrupt prescription.—3. The intervenants' title and constant possession gave them ownership of the land, notwithstanding the title of conveyance to their *autour*.—4. The intervenants had a sufficient interest to intervene, having shewn a possession which was troubled by the plaintiff's action.—5. Possession which affects a whole lot of land renders it unnecessary to prove particular acts of possession, within a year and a day, of any special part of the lot. *Dupré v. Harbour Commissioners of Three Rivers*, Q. R. 23 S. C. 439.

**5. Usufructuary of undivided half.]**—The usufructuary of an undivided half of an immovable has a right of action in trespass. *Martin v. Campbell*, Q. R. 23 S. C. 522.

See COSTS, VI. 14 — DAMAGES, 6—MUNICIPAL CORPORATIONS, VI. 1, XVI. 9—NUISANCE, 4 — RAILWAY, VII. 2—WATER AND WATERCOURSES, 8.

## TRIAL.

- I. INSCRIPTION FOR TRIAL.
- II. JURY.
- III. JURY NOTICE.
- IV. NOTICE OF TRIAL.
- V. POSTPONEMENT.
- VI. TEST ACTION.

See APPEAL, X. 4 — CONSTITUTIONAL LAW, 9, 10—COSTS, VII. 2—CRIMINAL LAW — EVIDENCE, IV. 2, 5 — HUSBAND AND WIFE, VII. 1—LIQUOR ACT OF ONTARIO, 3—MASTER AND SERVANT, II. 4—MINES AND MINERALS, 3—NEW TRIAL—PARLIAMENTARY ELECTIONS, II. 7, 11, 12, 13, III. 4—PARTICULARS, 1—VENUE—WATER AND WATERCOURSES, 9.

### I. INSCRIPTION FOR TRIAL.

**1. Irregularity — Time—Joinder of issue.]**—An inscription for hearing upon the merits filed less than three days before issue joined is illegal and will be set aside on motion. *Brisson v. International Harvester Co.*, 6 Q. P. R. 42.

**2. Reinstatement of case struck out—Notice.]**—Where a case, inscribed on the roll for trial, has been struck out in the absence of the attorneys, it may be reinstated on the roll on the application of either of the parties, after notice to the other party. *Carter v. Walker*, Q. R. 23 S. C. 123.

See NOTICE OF INSCRIPTION.

## II. JURY.

**1. Application for — Time.]**—A special application to a Judge for leave to exercise the option of having a case tried by a jury, when that option has not been exercised by the declaration or the defence, must be presented to the Judge within the three days which Art. 423 fixes for this purpose, and it will not suffice to give to the opposite party notice of this application within this time, even when one of the three days is a non-judicial day. *Canadian Pacific R. W. Co. v. Foster*, Q. R. 12 K. B. 139.

**2. Application for — Time—Non-judicial day.]**—Where the third and fourth days following that upon which issue is joined are non-judicial days, a motion for leave to elect to have a case tried by a jury may be presented on the following judicial day. *Morlock v. Webster*, 5 Q. P. R. 484.

**3. Application for — Time—Pleading.]**—A plaintiff who is in default for a reply to a plea, may obtain leave to file his reply, but such filing will not have the effect of extending the time to elect for trial by jury, the time therefor having expired on the fourth day after issue joined. *Deniger v. Grand Trunk R. W. Co.*, 5 Q. P. R. 136.

**4. General verdict—Questions submitted — Oral contract — Credibility of parties.]**—The terms of an oral contract were in question. The plaintiff and defendant, being the only witnesses on the point, each swore positively to his version of the contract.—Counsel for each of the parties at the trial proposed certain questions, asking that they be submitted to the jury and objecting to the submission of the questions proposed by the other side.—The Judge submitted both sets of questions, but directed the jury that they were at liberty either to answer the questions and thus give a special verdict or to give a general verdict. The jury gave a general verdict for the plaintiff.—On a motion by the defendant to set aside the verdict:—*Held*, that the question of there being a mistake or no *consensus ad idem*

did not arise, and that the verdict depended on the jury's view of the credibility of the parties, and that, therefore, the verdict should not be disturbed. *Newson v. McLean*, 2 Terr. L. R. 4.

**5. Jurors** — *Same juror sitting on former trial—Challenge—New trial.*—The fact that a member of a special jury was one of the jurors at a former trial is a good ground of challenge at a new trial, but the fact that such a juror served without challenge is not *per se* a ground for granting a new trial.—At the first trial, with a special jury, the plaintiff got a verdict in his favour, and on appeal a new trial was ordered. At the second trial a nonsuit was entered, and on appeal a new trial was ordered. At the third trial, also with a special jury, the plaintiff got a verdict in his favour. Between the second and third trials the defendant changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present at either the second or the third trial. J. M. was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of the fact until after the conclusion of the trial:—*Held*, refusing a new trial on this ground, that in selecting a special jury it was the duty of the solicitor to ascertain any grounds of challenge, an opportunity to do which is provided by s.s. 5 of s. 59 of the Jurors Act. *Harris v. Dunsmuir*, 22 Occ. N. 341, 9 Brit. Col. L. R. 303.

**6. Right to jury** — *Action to set aside will—Issues.*—In an action to set aside a will on the ground that it was obtained by fraud and undue influence, the plaintiff asked for a jury:—*Held*, that the action was one of those referred to in Rule 81, and as such, according to Rule 330, must be tried without a jury.—*Per DRAKE, J.*, that the character of an action is determined by the issues raised in the pleadings rather than by the prayer for relief. *Stewart v. Warner*, 4 Brit. Col. L. R. 298, and *Corbin v. Lookout Mining Co.*, 5 Brit. Col. L. R. 281, approved. *Hopper v. Dunsmuir*, 10 Brit. Col. L. R. 17.

**7. Right to jury—Duty of Judge.**—The power which a Judge has to take a case away from the jury should be exercised only when it is clear that the plaintiff could not hold a verdict in his favour: if the matter is reasonably open to doubt, the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported. *Nightingale v. Union Colliery Co. of British Columbia*, 23 Occ. N. 206, 9 Brit. Col. L. R. 453.

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ing that the plaintiff set down his action for the next sitting at Nelson and proceed with the trial, otherwise the action do stand dismissed without further order, dispenses with a notice of trial; and if, before the date fixed for the sitting at the time the order was made, the sitting is adjourned, it is a compliance with the order by the plaintiff if he enters the action for the later date, and is ready for trial when the case is called. *McLeod v. Waterman*, 9 Brit. Col. L. R. 370.

See PLEADING, VIII. 4.

#### V. POSTPONEMENT.

**Peremptory order for trial.]—**An order that the plaintiff set his action down for trial for a certain sitting, and in default that his action be dismissed without further order, is not a peremptory order for trial; and where the plaintiff has complied with the order, and moves at the trial for a postponement, it will be postponed if a proper case is made out. *Thurston v. Weyl*, 9 Brit. Col. L. R. 452.

#### VI. TEST ACTION.

**Substitution of another action as test action.]—**After one of a number of actions brought by different plaintiffs against the same defendants in respect to causes of action which were identical has been ordered to be tried as a test action, the Court has power to substitute another action as a test action.—Twenty-nine actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on the plaintiffs' application an order for a test action was made, the order providing that the defendants, if dissatisfied with the result of the test action, might apply to have the other action proceeded with, and that they might apply to have any of the actions forthwith proceeded with, if there existed any special ground of defence applicable to it, and not raised in the test action. After obtaining the order, the plaintiffs' solicitor discovered that, on account of the particular place in the mine in which McLeod was killed, a separate defence not applicable to the other cases might apply, and an application was made for the substitution of another action as the test action:—*Held*, that the object of the order, which was provisional in its nature, was to have a fair test action, and, as the one chosen would not be a fair one, another should

be chosen.  
*Coal Co.*,  
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intention of testator was to give the legacy to B., subject only to the obligation to use it for the support and education of the children; that if the sum of £500 became at any time subject to the terms of the trust, it became free from its operation as soon as the purposes of the trust were performed; and that the defendants, having whatever rights in the fund B. had, were no more answerable to the plaintiffs than B. himself would be. *Bissett v. Taylor*, 35 N. S. Reps. 440.

**3. Shares in building society—**  
*"In trust"* — *Notice* — *Mortgage* — *Purchaser for value* — *Consolidation* — *Parties.*]—The judgment in 22 Occ. N. 160, 3 O. L. R. 497, affirmed with a variation as to parties. *Birkbeck Loan Co. v. Johnston*, 6 O. L. R. 258.

**4. Will — Misappropriation by co-trustee — Limitation of actions—Trustee Act—Bar.]**—R. G. died in 1870, having by his will given the income of his estate to his widow for life, and, subject to certain bequests, the residue to the children of his brothers and sisters, and appointed T. H., J. G., and the widow executors and executrix of his will, with power "to dispose of the property if they see fit." J. G. managed the estate until the time of his death in 1885, by which date some of the real property had been disposed of and invested, and his management was duly accounted for. T. H. then took the management of the estate until 1895, when the widow, after much pressure by her friends, took proceedings against him for an account, the result of which was that he was found largely indebted, and a large sum was lost to the estate. The widow died in 1902; probate of her will was then granted to the defendants; and T. H. was removed as trustee, and the plaintiffs appointed in his place.—In an action by the plaintiffs against the defendants in 1903 to compel them to make good the losses to the estate of R. G. occasioned by the negligence of the widow in permitting her co-executor to misappropriate the funds of the estate:—*Held*, that, as all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, s. 32 (1) (b) of the Trustee Act, R. S. O. 1897 c. 129, was a good defence. *In re Bowden, Andrew v. Cooper*, 45 Ch. D. 447, followed. *Gardner v. Perry*, 23 Occ. N. 295, 6 O. L. R. 269.

See ASSESSMENT AND TAXES, VI. 2—EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE, IX. 6—INTEREST, 4—MUNICIPAL CORPORATIONS, XVI. 6—SCHOOLS, 5—TENANTS IN COMMON—WILL.

## TUTOR.

See COURTS, IX. 1—INFANT, 4, 5, 7,

## UNDUE INFLUENCE.

See GIFT, 9.

## UNINCORPORATED ASSOCIATION.

See CONTEMPT OF COURT, 3—DISCOVERY, I. 3—PARTIES, 8, 10, 11—PLEADING, X. 1—TRADE UNION, 2—WRIT OF SUMMONS, I. 4.

## VACATION.

See PLEADING, IV. 10.

## VACCINATION.

See PUBLIC HEALTH, 2.

## VAGRANCY.

See CRIMINAL LAW, IV. 4.

## VALUATION.

See ASSESSMENT AND TAXES, VII.

## VENDOR AND PURCHASER.

**1. Action for purchase money—**  
*Time for payment* — *Acceleration*—*Insolvency of purchaser.*]—Under Art. 1092, C. C., an action to recover the balance of purchase money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security. Judgment of Court of King's Bench, Quebec, affirmed. *Kensington Land Co v. Canada Industrial Co.*, [1903] A. C. 213.

**2. Agreement for sale of land —**  
*Title* — *Tender of transfer from third party* — *Action for purchase money* — *Repudiation* — *Penalty* — *Specific performance* — *Election.*]—Where at the time of an agreement for sale and purchase of land, the title to the land stood in the name of the vendor's wife, but the



vendor obtained and tendered a transfer from his wife to the purchaser before the purchaser repudiated the agreement:—*Held*, following *Pauley v. Wills*, 19 O. R. 303, 18 A. R. 210, that the purchaser was liable to an action for balance of purchase money.—Right to repudiate discussed.—If a thing be agreed to be done, though there be a penalty annexed to secure its performance, yet the very thing itself must be done, and the Court will not permit the person on whom the penalty rests to resist specific performance by electing to pay the penalty. *Hamilton v. McNeill*, 2 Terr. L. R. 31.

**3. Offer to sell — Purchaser pendente lite — Certificate of lis pendens — Specific performance — Delay — Damages.**—A letter by the vendor's agent to a probable purchaser, giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and, upon the person so written to stating that he wishes to buy at the price named, a contract of sale and purchase is constituted between the parties.—After the contract for the sale had been entered into, the vendor sold and conveyed the land in question, which was of a speculative character, to a third person, who purchased in good faith and without notice of the prior contract. Before he registered his deed the original purchaser began this action for specific performance and registered a certificate of lis pendens, but, although he knew of the second sale, he did not take any step in the action, or make the second purchaser a party, for nearly twelve months:—*Held*, that the second purchaser's rights were not affected by the registration of the certificate; and that in any event the delay would have been fatal to the claim for specific performance as against him.—The vendor having deliberately broken his contract because of a better offer, substantial damages were assessed against him. *Cleryue v. McKay*, 23 Occ. N. 243, 6 O. L. R. 51.

**4. Rescission of sale — Part performance of contract — Non-fulfilment of conditions — Abandonment.**—The defendant had sold his restaurant to the plaintiffs, who had paid a part of the price in cash, another part being agreed to be paid on the day of the transfer of the liquor license, and the balance by monthly payments thereafter. The defendant put the plaintiffs in possession of the restaurant, but afterwards retook possession. The plaintiffs took no steps to obtain the transfer of the license, and

the defendant did not offer them a transfer. Subsequently the plaintiffs sued for the cancellation of the sale and to be reimbursed what they had paid to the defendant, alleging that he had disposed of them:—*Held*, that the parties not having executed or really intended to execute the bargain made between them, there was ground for adjudging the cancellation of the sale. *Cotté v. Neveu*, Q. R. 22 S. C. 268.

**5. Rents of land—Apportionment—Contract — Conveyance.**—The plaintiff, on the 29th May, 1902, contracted in writing with the defendant for the sale to the defendant of certain land, a portion of which was at the time under lease to a tenant whose term commenced on the 1st May, 1902, and was then unexpired. The plaintiff claimed an apportionment of the rent between the 1st May and the 24th June, when the deed was delivered:—*Held*, that the Act respecting the apportionment of rent, R. S. N. S. c. 150, s. 2, did not apply as between vendor and purchaser, and the written contract containing no reservation of rent, the purchaser was entitled to the whole rent. *Müller v. Nicholls*, 23 Occ. N. 176.

**6. Sale of land at auction en bloc — False bidding — Part payment.**—Where an immovable composed of several lots is sold at auction *en bloc*, in pursuance of notice of sale, a sum paid on account of the purchase price should be deducted from the total price, and one of the purchasers cannot escape the consequences of false bidding by saying that he has paid his part. *Marceau v. Morin*, 5 Q. P. R. 349.

**7. Sale of land without title — Remedy of purchaser — Executor — Power to convey.**—A purchaser of land troubled in his possession has no right of action *en garantie* against his vendor who has sold him the land of another, but has a right of action for indemnity.—2. In the absence of express provisions in a will, an executor cannot, without the consent of his co-executors, as such executor, transfer the title to property. *Gosselin v. Martel*, 5 Q. P. R. 265.

**8. Sale of mining rights — Fraud — Exaggerated representations — Reacquisition — Parties.**—Representations exaggerating the value of rights sold do not constitute acts of fraud which give to the purchaser the right to insist that the sale is void, but they amount to a simple wrong, which is not a ground for nullifying a contract between adults.—2. An action to set aside a sale of mining rights and rights of redemption, of which the plaintiff alleges that he possesses only

a part, will be dismissed upon demurrer, if the owners of the other parts of such rights are not before the Court. *Jean-notte v. Caron*, 5 Q. P. R. 183.

**9. Warranty of vendor — Eviction — Charges.]**—A purchaser of immovables cannot sue his vendor, nor the grantor of his vendor, to obtain from him a clear title, before eviction from his property, or before having been sued for charges or claims upon it which were not made known to him at the time of the purchase. *Trudeau v. Molleur*, 5 Q. P. R. 221.

**10. Warranty of vendor—Failure of title — Specific performance — Rescission — Payment by vendor to real owner — Remedy against arrière-garant.]**—The purchaser of an immovable with a legal guarantee, whose vendor was not the owner at the time of the sale, may, without waiting until the true owner claims possession of the immovable, sue his vendor for rescission of the sale or to compel him to make a good title.—2. When, in such a case, the vendor can obtain a good title by paying a fixed sum to the true owner, the purchaser may have judgment against the vendor for payment of this sum to the true owner, and upon default by the vendor in the payment of it within the time fixed, the purchaser may make the payment and charge the vendor with it.—3. The purchaser may exercise this remedy against the vendor's predecessor in title who has given a *garantie*. *Trudeau v. Molleur*, Q. R. 24 S. C. 27, 5 Q. P. R. 418.

**11. Warranty of vendor—Incumbrance — Discharge — Title deeds — Certificate of registrar.]**—The purchaser of an immovable, sold to him with *garantie*, may demand that the vendor be ordered to pay off a creditor who at the time of the sale had a hypothec upon the immovable.—2. On such a sale, the vendor is bound to hand over to the purchaser the title deeds of the immovable sold, and among them the certificate of the registrar stating that the immovable is free from all charges and hypothecs. *In re Banque Ville-Marie*. Q. R. 22 S. C. 162.

**12. Warranty of vendor—Incumbrance — Special municipal charge—Apparent charge.]**—The warranty of the vendor of an immovable property does not extend to a charge imposed by the municipality in which the property is situate, for a term of years, as a special tax for the cost of a drain, except as to the arrears of such tax due by the vendor at the date of the sale. *Thibault v. Robinson*, Q. R. 3 Q. B. 280, and *Les Bo-*

*clésiastiques du Séminaire de St. Sulpice v. Masson*, Q. R. 10 K. B. 570, followed. *Sharpe v. Dick*, Q. R. 22 S. C. 527.

See ASSESSMENT AND TAXES, II., VI. 2—ATTACHMENT OF DEBTS, I. 6—DEED, 1—DOWER, 1, 2—EXECUTION, IV. 1, 5—OPPOSITION, 3 — PARTICULARS, 8, 10—PRINCIPAL AND AGENT, 7-10—SPECIFIC PERFORMANCE—WILL, II. 17, 20.

## VENTE A REMERE.

See BANKRUPTCY AND INSOLVENCY, II.

## VENUE.

**Cause of action—Con. Rule 529 (b) — Declaratory action.]**—“Cause of action” in Con. Rule 529 (b) means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part, or the whole, in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience.—*Quære*, whether an action for a declaration of right falls within the Rule? *Conner v. Dempster*, 23 Occ. N. 307, 6 O. L. R. 354.

## VERDICT.

See TRIAL.

## VIS MAJOR.

See NEGLIGENCE, 5—TIMBER.

## VOLUNTARY CONVEYANCE.

See DOWER, 3 — FRAUDULENT CONVEYANCE, 4.

## VOTERS' LISTS.

See PARLIAMENTARY ELECTIONS. IV.

## VOTING.

See CONSTITUTIONAL LAW, 9 — LIQUOR ACT OF ONTARIO—MANDAMUS, 2—MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS — PENALTIES AND PENAL ACTIONS, 2, 3.

**WAGES.**

See **BANKRUPTCY AND INSOLVENCY**, III. 2—**COURTS**, V. 1—**MASTER AND SERVANT**, III. 5.

**WAIVER.**

See **ARBITRATION AND AWARD**, 6—**BANKRUPTCY AND INSOLVENCY**, I. 7—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 18, 19, 20—**CONTRACT**, VIII. 4—**COSTS**, VII. 8—**COURTS**, I. 3, II.—**COVENANT IN RESTRAINT OF TRADE**, 1—**CRIMINAL LAW**, III. 16—**EVIDENCE**, IV. 3—**INSURANCE**, I., II. 1, 4—**INTEREST**, 1—**JUDGMENT**, IV. 1—**MALICIOUS PROSECUTION**, 1—**PLEADING**, IV. 7, IX. 2, 3—**SALE OF GOODS**, V. 1.

**WAREHOUSE RECEIPTS.**

See **COMPANY**, I. 3.

**WAREHOUSEMEN.**

See **RAILWAY**, II. 1.

**WARRANT OF COMMITMENT.**

See **CRIMINAL LAW**, II. 15 — **LIQUOR ACT OF ONTARIO**, 3.

**WARRANTY.**

See **CONTRACT**, VIII. 4—**DAMAGES**, 7—**DOWER**, 2—**PARTICULARS**, 9—**PLEADING**, IV. 2—**SALE OF GOODS**, V.—**VENDOR AND PURCHASER**, 9-12.

**WASTE.**

**Charge of annuity—Life tenant and remainderman — Apportionment—Damages—Security—Timber.**] — A testator seised in fee of land, subject to a mortgage, to secure an annuity for his wife, devised the land to one for life, with remainder over in fee. After his death, the life tenant paid the annuity to the widow. She also sold the timber on the land, and the purchaser having begun to cut the timber, this action was begun by the remainderman to restrain waste. The life tenant contended that she was entitled to be subrogated to the rights of

servitude was to be exercised:—*Held*, that the plea of the defendant was bad in law in that it combined the petitory and possessory.—2. That before building the new dam the defendant should have obtained permission from the plaintiff or from the Court.—3. That Arts. 503, C. C., and 5535, R. S. Q., do not authorize a riparian proprietor to build a dam upon the land of another riparian proprietor upon the other side of the river, without the permission of the latter, but are applicable only to the use of the watercourse. *Demers v. Beauregard*, Q. R. 22 S. C. 273.

**3. Discharging water on neighbour's land—Remedy—Landlord or tenant—Servitude.]**—Where a lessee of the defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land, with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—*Held*, that the plaintiff's remedy was against the lessee, and that an action *négoce* against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary. Judgment of Court of King's Bench, Quebec, Q. R. 11 K. B. 173, reversed. *Kieffer v. Le Séminaire de Québec*, [1903] A. C. 85.

**4. Injury to land by flooding—Claim for damages—Summary procedure—Costs of action—Erection and maintenance of dam—Liability of owners—Tolls—Liability of lumbermen using dam—Injunction.]**—The judgment of STREET, J., 4 O. L. R. 293, was affirmed for the reasons given by him; and, in addition to the damages awarded to the plaintiff against the added defendants, an injunction was granted restraining those defendants from penning back the waters of the river in question, but the operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R. S. O. 1897 c. 194, or otherwise. *Neely v. Peter*, 23 Occ. N. 166, 5 O. L. R. 381.

**5. Navigability of stream—Crown grant—Reservation—Prescription—Acquiescence.]**—It does not follow that, because a river is navigable and floatable, all its branches must be considered so. The navigability of a stream cannot be established by any rule of law: it is a question of fact.—2. The grant of land from the Crown includes the bed of a

non-navigable and non-floatable creek running through it, and no specific grant of the bed of the creek is necessary. Moreover, in this case, the reservation of gold and silver mines in favour of the Crown, contained in the grant, indicated that everything outside of the reservation was granted.—3. Although there is no prescription against the Crown, yet the conduct of the constituted authorities in allowing the creek to be used by the patentees, and their successors and assigns, openly, publicly, peaceably, and uninterruptedly for 96 years, is evidence of acquiescence in their pretensions. *City of Hull v. Scott*, Q. R. 24 S. C. 59.

**6. Navigable river—Dam—Riparian proprietors—Public right—Mistrial—New trial.]**—The owner of the *alveus* of a navigable river and of the land on both sides of it upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property.—Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage.—The public right is not a paramount right, but a right concurrent with that of the riparian owners; and if, in the exercise of their public right, the defendants, in driving their logs down the river, injured the plaintiff's dam, the onus is upon them to shew that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury: *per BARKER, J.*—*Per TUCK, C.J., McLEOD and GREGORY, JJ.*, that where the clear weight of evidence is against the plaintiff's claim, and important questions involved have not received due consideration on the trial, the case should be sent down for a new trial.—*Per HANINGTON, LANDRY, and BARKER, JJ.*, that if there is evidence to justify the jury in finding for the plaintiff on the material point in dispute, the verdict should not be disturbed, even though the case was not tried out with due regard to other important points. *Koy v. Fraser*, 36 N. B. Repts. 113.

**7. Procès-verbal—Servitude—Artificial watercourse—Municipal corporations—Parties.]**—A *procès-verbal* establishing an artificial watercourse to bring water from a higher land to a lower, which would not flow there naturally, is illegal and will be annulled.—2. In an action to annul such a *procès-verbal*, it is not necessary to make a county council which, sitting in appeal, had amended the said *procès-verbal*, a party to the suit. *Brouillet v. Parish of St. Severin*, Q. R. 22 S. C. 159.

**8. Trespass to land—Riparian proprietor—Conveying timber and lumber on stream.]**—The plaintiff was the owner of land bounded on one side by a stream, above tidewater and not navigable. The defendant was a lumberman, and, in order to assist his operations in driving logs down stream, erected a permanent dam, one end of which rested on the plaintiff's land. To an action by the plaintiff for damages the defendant pleaded *inter alia* that the entry complained of was a reasonable use of the land and was a use authorized by R. S. N. S. 1900 c. 95, "of the conveying of timber and lumber on rivers and the removal of obstructions therefrom," and amending Acts:—*Held*, that the erection of the dam was clearly a trespass and could not be justified under c. 95, or under the Acts of 1902 c. 33, no commissioner having been appointed for the stream in question or for the river into which it ran; that s. 15 of c. 95, which gives the right to construct dams necessary to facilitate the floating of logs down streams during freshets, is subject to the provisions of s. 6, which requires the assent of the owner of land entered upon to be obtained, and can only be construed to apply to temporary erections, and not to permanent erections, such as the one in question; that s. 17 of c. 95, as amended, only gives the right to enter for the purpose of driving or removing logs and not for the purpose of making erections; and that, as the plaintiff had failed to prove any substantial damage, there should be judgment in his favour for \$5 damages and costs. *Deal v. Cook*, 23 Occ. N. 70.

**9. Water rights—Decision of Gold Commissioner — Appeal from—Evidence on—Petition—Trial.]**—A County Court Judge refused to hear new evidence on an appeal before him under s. 36 of the Water Clauses Consolidation Act, which provides that the appeal should be in the form of a petition setting forth the facts and law relied on, which petition, along with an affidavit verifying it, should be filed and served, and to which the respondents should file and serve their answer:—*Held*, that the fact that there was to be a petition and an answer contemplated the raising of issues, and that the appeal should be a trial *de novo*. *Ross v. Thompson*, 23 Occ. N. 342.

**10. Water rights — Water Clauses Consolidation Act, B.C.—Jurisdiction of Gold Commissioner—Statutes.]**—Under s. 11 of the Rossland Water and Light Company Incorporation Act, 1896, the rights of the city of Rossland, which purchased the waterworks system of the company, to the waters of Stoney Creek, are paramount but not exclusive, and the

Gold Commissioner has jurisdiction to adjudicate on an application under s. 18 of the Water Clauses Consolidation Act for an interim record of the surplus water not used by the city. *Centre Star Mining Co. v. City of Rossland*, 9 Brit. Col. L. R. 408:

See INJUNCTION, 8—JUSTICE OF THE PEACE, 2 — MUNICIPAL CORPORATIONS, VI. VII.— NEGLIGENCE, 5 — TIMBER—WAY, II. 1.

## WATERWORKS.

See MUNICIPAL CORPORATIONS, I. 6.

## WAY.

I. INJURY FROM NON-REPAIR OF HIGHWAY.

II. OTHER CASES.

See CONSTITUTIONAL LAW, 3—CROWN, III. 3—EASEMENT—MASTER AND SERVANT, II. 10—MUNICIPAL CORPORATIONS, VII. 1, IX.—RAILWAY.

I. INJURY FROM NON-REPAIR OF HIGHWAY.

**1. Approach to railway crossing**—*Fence—Municipal corporation.]*—By s. 611 of the Municipal Act, R.S.O. 1897 c. 223, first introduced in 1896, no liability is now imposed on a municipal corporation by reason of want of repair of railway crossings through there being too high a grade and the omission to fence, the obligation therefor being under s. 186 of the Dominion Railway Act, 51 V. c. 29, imposed on the railway company.—Where, therefore, under s. 186, the approach to a railway crossing must not be more than one foot rise or fall for every twenty feet of the horizontal length of such approach, unless a good and sufficient fence shall be made by the railway company on each side thereof, and in this case the grade line was four feet without any fences, the municipal corporation was held relieved from liability to a person who was injured. *Holden v. Township of Yarmouth*, 23 Occ. N. 181, 5 O. L. R. 579.

**2. Bridge — Absence of railing — Negligence of municipality — Notice of accident — Requirements of — Mistake in date—Damages.]**—Actions for damages sustained by plaintiff, who was crossing a bridge in the defendants' township dur-

ing a thunderstorm between 9 and 10 o'clock at night on the 6th May, 1902, when a sudden flash of lightning caused his horse to swerve, and the horse's foot went into a gap in the logs of which the bridge was constructed, close to the edge of the bridge, and, there being no railing at the side of the bridge, they all fell over into the water, which was within 18 inches of the bottom of the bridge, and the plaintiff sustained injury. On the 26th May the plaintiff gave notice to the defendants of the accident as having occurred on the 7th May, instead of on the 6th May, describing the circumstances and stating it was during a thunderstorm, and also that he had rescued his horse by the aid of a certain neighbour, whom he named:—*Held*, that the cause of the accident as a matter of law and fact was the negligence of the defendants in not providing the bridge with a proper railing, and that the thunderstorm was one of those ordinary dangers which ought to have been thus provided against, and that the notice given to the defendants was sufficient within s.s. 3 of s. 606 of the Municipal Act, and the defendants were liable; and the damages (\$200) were not excessive. *McInnes v. Township of Egremont*, 23 Occ. N. 193, 5 O. L. R. 713.

**3. Failure of municipality to remove snow — Negligence — Agreement with street railway company — Breach — Liability.**—A railway company acquired a street railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran, as provided by s. 10 of 50 V. c. 33 (N.B.), and also the obligation of removing the snow and ice as provided by s. 10 of 55 V. c. 29. In 1895 58 V. c. 72 was passed, s. 6 of which authorized the company to agree with the city of St. John to pay the city an annual sum to be agreed upon as a consideration for taking care, etc., of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement. Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorized to do:—*Held*, in an action for damages for injury to the plaintiff caused by the defendants' negligence in not removing the snow in a street through which the railway ran, that s. 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere nonfeasance for which they were not liable at the suit of a private individual; and a nonsuit should be entered.

*McCrea v. City of St. John*, 36 N. B. Reps. 144.

**4. Liability of municipal corporation — Proximate cause of injury — Precautions.**—It is sufficient for a plaintiff, claiming damages from a municipal corporation on account of injuries received in an accident upon a road under the control of the corporation, to prove that the road was in a bad condition; he must prove that the bad condition of the road was the direct and immediate cause of the accident, and that he could not have avoided it by taking the precautions which would be expected from a prudent man. *Beaulieu v. Corporation of St. Urbain Premier*, Q. R. 22 S. C. 208.

**5. Public highway — What constitutes.**—A winter road, open to everybody, over which a great number of persons pass and which has nothing about it to indicate that it is a private road, is a public road, and the corporation of the municipality in which it is situated are liable for injuries caused by non-repair. *Duchêne v. Corporation of Beaufort*, Q. R. 23 S. C. 80.

See COSTS, VII. 1.

## II. OTHER CASES.

**1. Private way — Suffrance — Floatable river — Improvements — Riparian proprietors — Damages — Malice — Threat.**—A way of suffrance is not a public road, and the owner may forbid the use of it to any one he pleases.—2. A floatable river is part of the public domain, and the riparian proprietors cannot hinder the doing of work thereon for the purpose of facilitating the floating of logs.—3. The exercise of a right within permitted limits cannot serve as a basis of an action for damages; and the forbidding of a certain thing, accompanied by a threat of instituting proceedings, in case it is done, in order to cause one's right to be recognized, implies no malice which can afford ground for an action for damages. *Pierce v. McConville*, Q. R. 12 K. B. 163.

**2. Right of way appurtenant to land — Prescription — Enjoyment for 40 years — Interruptions — Life estate — Pleading.**—In an action by the plaintiff for trespass to land, of which the plaintiff was the admitted owner, the defendant justified under an alleged right of way appurtenant to land owned by his father, J. W., which J. W. and the defendant were farming jointly at the time the alleged trespasses were committed.—

The evidence shewed that J. W. became the owner of and went into possession of his land in 1855, at which time A., the plaintiff's predecessor in title, was owner of and in possession of the servient tenement. That in April, 1856, J. W., with the knowledge and assent of A., made use of the way claimed, being informed by A. that he had the right to do so, and that the way had been given by the previous owner, P. A., for the benefit of the lots owned by J. W. That there had been a user, at various times in each year, as required, from 1856 down to 1890, the time of action brought, without any interference by plaintiff, or others, until 1896, when, and in 1897, 1898, and 1899, the plaintiff obstructed the way, and sought to prevent the defendant from using it. That the obstructions placed by the plaintiff were, in each instance, removed, or protested against, by the defendant. — Evidence was given on the part of the plaintiff to shew that a gate had been maintained across the way, and that the user was permissive, but the trial Judge found that the gate was maintained with the defendant's permission, and that its purpose was to avoid the expense of fencing, and to prevent cattle straying at certain seasons of the year.—As to the character of the way, the evidence shewed that it was a well defined road, with deep wheel tracks over its entire length, except for a few feet close to the gate, where the ground was hard and stony. Also, that the road had been in the same condition throughout the whole period during which it had been used: — *Held*, that the defendant was entitled to the way claimed:—*Held*, also, (following *Symons v. Leaker*, 15 Q. B. D. 629), that the period from 1871 to 1896, during which a life estate was outstanding in the plaintiff's mother, was not to be excluded in computing the period of forty years referred to in R. S. N. S. 1900 c. 167, s. 36, although it should be excluded in computing the shorter period of twenty years.—*Semble*, that the tenancy for life, being a matter in respect to which the defendant would not ordinarily have knowledge, and the plaintiff would, should have been replied by the latter.—*Held*, also, that the occasional attempts at interruption by the plaintiff in 1897, 1898, and 1899, not acquiesced in by the defendant, were not sufficient to defeat the operation of the statute. *Eisenhauer v. Whynacht*, 35 N. S. Repts. 295.

**3. Toll road** — *Avoiding by private way — Damages.*]—A person whose land abuts upon a toll road upon one side, and upon the other side upon a public road upon which no right of toll exists,

the farm, that disposition could not be legally interfered with and the money diverted to another purpose. *Re Waddell, Lynch v. Waddell*, 35 N. S. Reps. 435.

**3. Legacies** — *Overpayment of legatees under judgment—Mistake—Repayment—Interest.*]—A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay: (1) to a sister a legacy of \$500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of \$500; (3) to the children of another niece a legacy of \$500; and (4) to a charitable institution a legacy of \$500; with a direction that, should there not be sufficient to pay all the legacies, there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions:" — *Held*, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each.—Proceedings were taken in the year 1882 for the administration of the estate, and, without, as was held in the previous judgment of this Court, 27 A. R. 242, proper proceedings being taken, it was assumed that there were no children of the niece, and the amount of their legacy and their share in the residue was divided among the charitable institution, the trustees, and one of the other legatees: —*Held*, that the trustees and the charitable institution were bound to repay the excess which they had received; *per curiam*, with interest from the date of proceedings taken by the children of the niece; and *per MACLENNAN, J.A.*, dissenting, with interest from the date of distribution under the report in the administration proceedings. *Uffner v. Lewis* (No. 2), *Boys' Home v. Lewis* (No. 2), 23 Occ. N. 217, 5 O. L. R. 684.

**4. Legacy—Acceptance—Legatee acting as executor.]—A claim made by an executor of a sum of money due to the estate which he is administering does not constitute on his part acceptance of a legacy to him, and does not deprive him of the benefit of the delay allowed for making an inventory and deliberating. *Renouf v. Turner*, 5 Q. P. R. 373.**

**5. Legatee predeceasing testatrix** — *Rights of husband and children.*]—A testatrix by will dated 23rd March, 1901, directed her estate to be divided into four equal shares and one share to be

paid to the husband of the testatrix, the testatrix's infant child, s. 36 of the will, s. 128, the one-fourth of the testatrix's estate, the residue of the testatrix's estate, N. 95, 2

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2. A testatrix by will directed her husband to pay to his wife a legacy of \$500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of \$500; (3) to the children of another niece a legacy of \$500; and (4) to a charitable institution a legacy of \$500; with a direction that, should there not be sufficient to pay all the legacies, there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions:" — *Held*, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each.—Proceedings were taken in the year 1882 for the administration of the estate, and, without, as was held in the previous judgment of this Court, 27 A. R. 242, proper proceedings being taken, it was assumed that there were no children of the niece, and the amount of their legacy and their share in the residue was divided among the charitable institution, the trustees, and one of the other legatees: —*Held*, that the trustees and the charitable institution were bound to repay the excess which they had received; *per curiam*, with interest from the date of proceedings taken by the children of the niece; and *per MACLENNAN, J.A.*, dissenting, with interest from the date of distribution under the report in the administration proceedings. *Uffner v. Lewis* (No. 2), *Boys' Home v. Lewis* (No. 2), 23 Occ. N. 217, 5 O. L. R. 684.

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... \$250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than the others, and a greater sum than \$250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother whatever may remain of the estate."—*Held*, that the sisters of the testator had the right to resort to the corpus of the fund provided for the payment of their annuities, if the income was sufficient.—*Mason v. Robinson*, 8 Ch. D. 411, and *Maley v. Randall*, 50 L. T. N. S. 717, followed. *In re McKenzie*, 23 Occ. N. 15, 4 O. L. R. 707.

**4. Bequest — Church — Trust — Mixed fund — Perpetuity — Abatement — Mortmain Acts.]**—A testator, who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed \$2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the trustees of the church:—*Held*, a good bequest:—*Held*, also, that the assignment by N. W. to the trustees of the church was a valid exercise of the discretion given him by the will. *In re Johnson, Chambers v. Johnson*, 23 Occ. N. 189, 5 O. L. R. 459.

**5. Bequest of bonds — Specific or demonstrative — Succession duty.]**—A testator possessed both at the time of making a codicil to his will and at the time of his death of a considerable number (more than 5) of \$1,000 debentures, bearing interest at four per cent., of a certain city, by the codicil devised to each of two devisees "one debenture of (the city) for the sum of \$1,000, bearing interest at four per cent. per annum," and directed "that, if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture of (the city) for the sum of \$1,000, bearing interest at four per cent:

—*Held*, that the legacies to the two legatees were not specific legacies; and that, even if they had been, the legatees were not entitled to receive them free of succession duty, and the executors should either deduct or collect the duty before paying them the legacies. *In re Mackey*, 23 Occ. N. 297, 6 O. L. R. 292.

**6. Charitable devises and bequests — Designation of beneficiaries — Perpetuities — Mortmain Acts.]**—Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Churchtown. . . . Ireland. The presiding clergyman, committee, and elders to have full control of all after me. They shall have the power to sell or rent to the best advantage. . . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, committee, and ruling elders, having succeeding authority to remember the poor of the church at Christmas every year, and to cheer the poor and the broken-hearted with the joy of Christ's death and sufferings, together with the presents presented by the minister, committee, and ruling elders at the Christmas time every year." By a codicil he appointed two persons executors and trustees, and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months of the making of the will and codicil, leaving both real and personal property:—*Held*, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently well designated, and came within the meaning of s. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. c. 2; and, the gifts being charitable, the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect:—*Held*, also, that the word "assurance" in s. 6 of s. 7 of that Act refers to a deed, not to a will, and therefore leaves s. 4 of R. S. O. 1897 c. 112 untouched, and under that section a devise in favour of a charity is good, though made within six months before the testator's death. *In re Kinny*, 23 Occ. N. 332, 6 O. L. R. 459.

**7. Codicil — Annuity payable out of legacy — Revocation — Lapse of legacy — Date of distribution.]**—Testator by his will gave to his trustees \$600 in trust to pay an annuity from the interest or corpus thereof of \$300 to his son R. during his life, and upon his death to pay to R.'s children P., S., and M.,

one-half, one-quarter, and one-quarter of said principal, respectively. In a subsequent clause it was provided that in case of the death of R. while any or either of said children should be under the age of 25 years, the trustees should pay to their mother while such children should be under that age an annuity of \$300 from said principal, "to which such child or children will be entitled on the decease of their father," for the maintenance of such child or children respectively, while he or she should be under that age. A codicil revoked the annuity to R. Testator was survived by R. and R.'s children, all being under the age of 25 years at testator's death, but S. was now of that age:—*Held*, that the codicil did not revoke the gift to R.'s children; that each child on attaining the age of 25 years was entitled to be paid his or her share; and that it was not the meaning of the will that the fund should be kept intact until the youngest of the children attained that age. *Lewin v. Lewin*, 23 Occ. N. 267.

**8. Codicil — Revocation of legacy—Statute of Mortmain—Bequest to school and poor — Validity.**—The testator in his will gave \$2,000 to his son William McMurray, and no other person named William was mentioned in it. In the codicil to the will he said: "I am sorry, my dear William, to make this alteration. I cut you off my will and leave you \$200. I leave \$500 to Acton school, . . . and \$300 to the three oldest and poorest people in Rosedale municipality . . ."*Held*, 1. that the bequest of \$2,000 to the son was revoked and one of \$200 substituted for it.—2. That the Statute of Mortmain, 9 Geo. II. c. 36, is in force in Manitoba, and the bequest to the school district of Acton, so far as it was directed to be paid out of land or the proceeds of land, was void, but that such proportion of the amount as the pure personalty of the estate bore to the whole estate should be paid, subject to abatement *pro rata* with other legacies if the estate should not be sufficient to pay all.—*Re Staebler*, 21 A. R. 266, followed.—*Brook v. Badley*, L. R. 3 Ch. 672, and *Re Watts*, 29 Ch. D. 947, distinguished.—3. That the gift of \$300 to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out. *Law v. Acton*, 22 Occ. N. 419, 14 Man. L. R. 246.

**9. Devise — Direction to keep and maintain.**—A testator directed his two sons to keep their two sisters until they married, in a suitable manner free of expense, and that so long as the sisters, or either of them, kept house for their brothers, they or she were to have con-

trol of and all own use farm, or death, to sell it—*Held*, do, was the sister manner, in the h they we ters to r and to ance. A 283, 6 C

**10. D** testator life, or dwelling etc., the marriage gave the he made or born alike, an ever:—*H* his child mits of, quent cl the gift bestowed less. Th the prin Godson, Jones-F Oram, 2 Bent, 23

**11. D** to be di for impr farm to at twent to be k . . . in impro case of share," a and daug ed in th to be di taining t to the h over and expended not less if necessi executors N. 50, 5

**12. D** to devise Land wa to her c if no c daughter. will was

D. was not of an estate in tail, but on her death her children took the fee.—Judgment of the Court of Appeal, 1 O. W. R. 452, affirmed. *Grant v. Fuller*, 23 Occ. N. 81, 33 S. C. R. 34.

**13. Devise of all testator's property** — *Chose in action.*] — A devise of all "my real estate and property whatsoever and of what nature and kind soever," at a place named, does not include a debt due by the devisee, who resided and carried on business at such place, to the testator.—Judgment of the Court of Appeal, 4 O. L. R. 682, 22 Occ. N. 379, affirmed. *Thorne v. Parsons*, 23 Occ. N. 180, 33 S. C. R. 309.

**14. Devisee** — *Use of house and allowance* — *Care in institution in the alternative* — *Exercise of judgment by executor* — *Reasonableness.*] — A testator by his will gave the defendant all his estate on condition that he should pay the plaintiff \$50 a month, and that she should have the use of the testator's house and furniture for her life; and by a codicil provided that if "in his (the executor's) own absolute judgment he is of opinion" that it would be best for her to be cared for in some institution, he should have the right and authority to place her there (with her consent in a specially mentioned case), and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance.—The defendant chose an institution where the plaintiff would be a paying inmate and be cared for (not the specially mentioned case), but the plaintiff refused to leave the house, and the defendant ceased paying the monthly allowance, and the plaintiff brought this action for the arrears of the allowance and for the construction of the will:—*Held*, that the will, executed in 1896, indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to the plaintiff that it would be for her welfare to give up housekeeping, and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her in a sufficiently adequate home (other than the specially mentioned case), without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house, and to cease paying the monthly allowance. *Leduo v. Booth*, 23 Occ. N. 46, 5 O. L. R. 68.

**15. "Dying without heirs"** — *Estate.*]—A testator gave and devised to his daughter all his real and personal property, subject to the payment of cer-

tain legacies and charges, and "in the event of her dying without heirs" then to the testator's brothers and sisters:—*Held*, that the ulterior devisees being related to the first devisee, the "heirs" of the first devisee must be construed to be "heirs of the body," and therefore that as to the realty the daughter took an estate tail, and as to the personalty an absolute estate. *In re McDonald*, 23 Occ. N. 326, 6 O. L. R. 478.

**16. Estate for life** — *Remainder to heirs* — "Then surviving."]—A testator devised land to his wife "during the full term of time that she remains my widow and unmarried," and subject thereto to two sons "during the full term of time of their natural lives . . . and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike:"—*Held*, that the will gave a life estate for the joint lives of the two sons, with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons. *Haigh v. Dangerfield*, 23 Occ. N. 87, 5 O. L. R. 274.

**17. Executors**—*Power to sell lands* — *Power to exchange* — *Vendor and purchaser.*]—A testator devised her real estate to be equally divided between her children when the youngest of them attained twenty-one, with a power to the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales:"—*Held*, that the executor had no authority to exchange the lands of the testatrix for other lands. *In re Confederation Life Association and Clarkson*, 23 Occ. N. 325, 6 O. L. R. 606.

**18. Inconsistent bequests** — *Reconciling* — *Formal bequest of residue.*]—A testator bequeathed all his clothing, wearing apparel, and personal effects to his brother; all his household furniture and other personal property to his sister; he then devised to his sister for life all his real estate, with remainder in fee to his nephew, subject to certain legacies and annuities which he charged upon it; and wound up his will by devising and "bequeathing the rest and residue of his

real and personal property to his nephew. —At the time of his death the testator's personal property consisted of: household goods and furniture, \$150; farming implements and live stock, about \$500; book debts and promissory notes, \$35; cash, \$273; wearing apparel, watch, chain, etc., \$25; total, \$983:—*Held*, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personality; the nephew taking none of it.—The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. *In re Pink*, 23 Occ. N. 16, 4 O. L. R. 718.

**19. Legacy — Date of vesting.]—**By his will the testator gave to his wife a life interest in all his property, and upon her death he bequeathed to an adopted daughter K. a sum of money to be invested in the name of A., her son, on any more issue of hers there might be; the interest to be hers for life; and in case of her death or her said son "leaving more issue, the remainder to be equally divided among them; and in case of her death, and her said son leaving no other issue, then the (said) sum to revert back to C." On the death of K. she was survived by her said son A. and two other children:—*Held*, that the fund vested absolutely on the death of K. in her three children, and that it was not the meaning of the will that the fund vested in C. in event of A. dying, leaving no brother or sister surviving him. *Kerrison v. Kaye*, 23 Occ. N. 158, 2 N. B. Eq. Repts. 455.

**20. Life estate — Estate tail — Survivorship — Disentailing deed—Condition of devise — Bearing testator's name — Vendor and purchaser.]—**A testator devised the lands "whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their second surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father:—*Held*, that the testator's son took a life estate only, and the surviv-

ing daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee:—*Held*, also, that the condition as to continuing to bear the testator's name did not prevent the daughter, being unmarried, from conveying in fee. *In re Brown and Slater*, 23 Occ. N. 172, 5 O. L. R. 386.

**21. Speaking from death—Stock in trade — "Now"—Household furniture — Books — Legacy—Incomplete words.]—**A testator gave all his estate of which he might die possessed in manner following: "to my sister E. the house and lands with all household furniture and all the stock and trade now in house and out of house, with all book accounts now due me, wherever found, for her own use and benefit forever, and out of this she shall pay to my brother B. \$100, also she shall \$100 to my brother W."—At his death, and when he made the will, the testator was the keeper of a country village shop, and his possessions consisted of a house and lot, where he carried on his business and lived, the capital employed in his business, his stock of goods, and what was owing to him by his customers, and his household and other effects, consisting of furniture, books, horses, harness, carriages, and sleighs.—Shortly after he made his will he sold his house and lot and business and afterwards repurchased them:—*Held*, that, although the gifts of the household furniture, the stock in trade, and the book debts, were specific bequests, nevertheless, being specific gifts of that which is generic, of that which may be increased or diminished, the will carried the household furniture, the stock in trade, and the book debts, as they existed at the time of the testator's death; and the use of the word "now" did not limit the gift to them as they existed at the date of his will. This was confirmed by the words of general bequest at the commencement, as also by certain other features of the will:—*Held*, also, that in the gift of the "stock and trade" the money of the testator on deposit in the bank and cash in hand and a quantity of cordwood for use in the shop and dwelling-house, two horses, harness, and vehicles, were embraced.—*Held*, also, that a number of books belonging to the testator passed as part of the household furniture.—The incomplete words of the gift to one brother were sufficient. *In re Holden*, 23 Occ. N. 52, 5 O. L. R. 156.

**22. Substitution — Clauses creating.]—**The testator bequeathed to his wife all his property "to be enjoyed by her during her natural lifetime;" by the next clause of his will he bequeathed to

his brothers and sisters all his property "to be enjoyed by them in absolute property and ownership," share and share alike, but only from and after the decease of his wife. The testator's wife survived him, and at the time of her death, B. was the only one of the brothers and sisters mentioned who was living, and she took possession of all the testator's estate. A nephew of the testator, a son of one of the brothers mentioned in the above clause of the will, brought this action for one-sixteenth of the estate, claiming that the will gave the widow only the usufruct, and that the brothers and sisters of the testator were bequeathed the naked ownership: — *Held*, affirming the decision of the Court of Review, that the will created a substitution, and that B., as the sole survivor of the substitutes at the death of the widow (the institute), was entitled to the whole estate. *Ryan v. Ryan*, 23 Occ. N. 116.

**23. Substitution—Opening—Legacy to substitutes—Per stirpes or per capita.]**

—By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, and after her death to his surviving children, and then gave it to the legitimate children of his children, to enjoy and have in equal parts and portions among them from the day that the enjoyment and usufruct of his children should cease, instituting his said grandchildren his universal legatees: —*Held*, that all the grandchildren participated in the legacy, and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such fifth portion, should be divided among all the grandchildren then living in equal shares, they taking *per capita* and not *per stirpes*. *Remillard v. Chabot*, 33 S. C. R. 328.

**24. Substitution or usufruct.]—**

In the interpretation of a will, if it is doubtful whether a certain provision creates a substitution or a legacy of usufruct and bare property, the decision must be in favour of a substitution.—2. There is a substitution when there are in one provision two successive gifts, a period of time between, and a successive order.—3. If the testator in disposing of his property does not say, whether it is absolutely or by way of usufruct, it will be held to be absolutely.—4. The following clause in a will creates a substitution: "I will, devise, and bequeath unto my beloved wife . . . all my property and estate . . . to be enjoyed by her only during her natural lifetime. I will, devise, and bequeath unto . . . my beloved brothers and sisters all my

property and estate . . . to be enjoyed by them in absolute property and ownership, share and share alike, but only from and after the decease of my said wife." *Ryan v. Ryan*, Q. R. 22 S. C. 174.

**25. Substitution or usufruct.]—**

The following clause in a will effects a substitution and not a bequest of usufruct and bare property:—"I will and bequeath to my well beloved wife . . . the enjoyment and usufruct during her life of all the property, movable and immovable, and the proceeds and revenues thereof of whatsoever nature and of whatsoever amount and wheresoever situated and title deeds, papers, rights of action, and other things generally whatsoever I shall leave at the date of my decease without excepting or reserving anything; for my said wife to enjoy the usufruct during her life and as long as she remains my widow without being obliged to give security nor to take any inventory nor to render an account to any one; and I forbid by this my will my children or any other person in any way to force my said wife to render an account or to make an inventory; but on her re-marriage, if she should re-marry, I will and intend that she shall render an immediate account to the children born of our marriage and afterwards make a good and true inventory; and the property in all such my said effects, movable and immovable, title deeds, papers, and rights of action, shall then belong to our said children as at the death of their mother my said wife." *Cabana v. Latour*, Q. R. 24 S. C. 83.

**26. Trusts — Provision for the appointment of new trustee—Construction**

—*Person to exercise powers—Time for exercising.*] — A testator appointed his two brothers executors and trustees of his will, and provided that in the event of the death, inability, or refusal to act of either of them, "then my surviving brothers and sisters or a majority of them shall by an instrument in writing . . . appoint a new trustee," etc. The testator died in 1899, and probate was granted to the two brothers, one of whom died in the same year. In 1900, by an instrument in writing, a majority of the brothers and sisters of the testator then living (one other brother having also died in 1899, after the testator), appointed the plaintiff a trustee in place of the deceased executor: — *Held*, that the appointment was valid.—The power to appoint a new trustee became operative in case either of the events provided for happened, whether in the lifetime of the testator or after his death; and it was the survivors of the brothers and sisters at the time of exercising the power, or a

majority of them, who had the power to appoint. *Saunders v. Bradley*, 23 Occ. N. 263, 6 O. L. R. 250.

**27. Use of property for life—Power of disposition—Intention of testator.]**—Testator by his will gave to his wife C. M. the use, rents, and proceeds of all his remaining real estate, personal property, mortgages, notes, etc., for her own use during her lifetime. At the death of his wife he devised the house and contents to A. M. for her own use and benefit during her lifetime, and at the death of A. M., he devised to his nephews and niece named, the said house and contents "as well as any money or securities which may remain after the death of my wife, C. M."—*Held*, that the disposal of any property which might remain over at the death of C. M., shewed an intention to give C. M. the disposition of the property during her lifetime. *In re Thompson's Estate*, 14 Ch. D. 263, and *Constable v. Bull*, 3 DeG. & Sm. 411, followed. *Re McDonald*, 35 N. S. Reps. 500.

See APPEAL, VIII. 1.

### III. EXECUTION.

**1. Formalities—Acknowledgment—Witnesses—Request—Attestation.]**—The testatrix having requested that witnesses be called in order that she might complete the execution of her will, two persons were brought, one of whom, presenting the instrument, which was signed by the testatrix, although not written by her, asked her if she was "perfectly satisfied with this," or "with this will." She answered, "I am perfectly satisfied." The two witnesses then signed the will in the presence of the testatrix and of several other persons, knowing it to be the will of the testatrix:—*Held*, that a document written in conformity to the directions of the testator, containing his wishes for the disposition of his estate, and signed by him, and also by two witnesses, is a will.—2. The acknowledgment by the testator, in the presence of the subscribing witnesses, and in answer to a question put by one of them, that the document signed is his will, is a sufficient compliance with Art. 851 of the Civil Code, which requires an acknowledgment by the testator of the signature, "as having been subscribed by him to his will then produced" in presence of the witnesses.—3. Art. 851, C. C., which says the witnesses "attest and sign the will immediately, in presence of the testator and at his request," but does not prescribe any form of request, is sufficiently complied with, where the witnesses, at the request of the testator, have been asked to come there for the special pur-

pose of witnessing the will, although, when present, they were not personally requested by the testator to sign.—4. The word "attest" in Art. 851, C. C., means simply to sign as witness, no attestation clause being required. *Hannah v. Brereton*, Q. R. 23 S. C. 98.

**2. Lost will—Evidence—Solicitor—Privilege—Declarations—Probate.]**—The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator, who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence.—Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn, and was claiming large benefits under, the will in question, which, it was alleged, had been lost or stolen.—The facts that the testator was aware that unless he made a will his property would go to the Crown; that he was an experienced man of business possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days' duration, he had expressed no wish to make a will: were held sufficient to rebut the presumption of destruction of the will by the testator. *Stewart v. Walker*, 23 Occ. N. 320, 6 O. L. R. 495.

### IV. VALIDITY OF CONDITIONS,

**1. Conditional gift—Charitable bequest—Fulfillment of condition—Procuring like sum.]**—Testator left a legacy of \$20,000 to the corporation of the town of Windsor to assist in building and maintaining an hospital for the sick, on condition that the town should "procure a like sum by a tax on the citizens, or from private donations or otherwise, to be added to this bequest." There was a gift over to another legatee, if the town, within seven years after the decease of testator, "fails to raise" the said additional sum. The sum of \$6,000 was raised from private donations, and the balance of \$14,000 was procured by grant from the Provincial Government:—*Held*, that the condition in the will was complied with, and the town corporation were entitled to be paid the legacy. *In re Payzant*, 23 Occ. N. 246.

**2. Restraint on alienation—Pre-  
catory condition—Substitution—Heirs.]**—There may be a restraint upon alienation in a testamentary disposition, even where the testator has not used prohibitive terms, and has only expressed a simple wish, as long as there is no doubt as to his intention.—2. A restraint upon alienation constitutes a substitution, if it appears that the testator has made it in the interest of a person for whom he designs the property of which he forbids the alienation. — 3. The restraint upon alienation, unless in favour of some of the presumptive heirs of the testator, constitutes a substitution, not only in favour of the heirs to whom the restraint does not apply, but in favour of all the presumptive heirs. *Létang v. Latour*, Q. R. 24 S. C. 15.

**3. Restraint on alienation—Time  
limitation.]**—A devisee of real estate under a will was restrained from selling or incumbering it for a period of twenty-five years after the testator's death:—*Held*, that, as the restraint, if general, would have been void, the limitation as to the time did not make it valid. *Blackburn v. McCallum*, 23 Occ. N. 133, 33 S. C. R. 65.

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I. SERVICE.

II. OTHER CASES.

See **COMPANY**, III. 10.

## I. SERVICE.

**1. Domicil** — *Service on attorneys—Certificate — Deposit — Exception — Affidavits.*] — The service of a writ of summons and declaration upon a defendant at his last known domicil and place of residence is regular although the same is no longer his ordinary residence.—2. Under the circumstances of this case the plaintiff's motion for leave to serve the writ and declaration upon the defendant's attorneys *ad litem*, was granted.—3. A copy of the prothonotary's certificate as to the deposit made with a declinatory exception must be served upon the plaintiff.—4. Rule 47 of the Rules of Practice of the Superior Court, regarding affidavits, applies only to special demands, and not to pleadings. *Higginson v. Reid*, 5 Q. P. R. 394.

**2. Foreign corporation** — *Officer temporarily in Province — Setting aside service—Status of applicant.*] — A writ of summons describing the defendant company as "doing business in the Province of British Columbia" was served upon J. G. McLaren, the manager of the defendant company, who was passing through British Columbia en route to Dawson. The company were incorporated in England, and not registered or licensed in British Columbia: — *Held*, that the service was irregular. Also that it is not necessary that a person who has been served with a writ should be a real defendant to entitle him to apply to set it aside. *Fall v. Klondyke Bonanza Limited*, 9 Brit. Col. L. R. 493.

**3. Foreign defendants—Service on traveller — Sale of goods — Contract—Completion—Goods delivered and refused—Property of defendant in jurisdiction.] — In a suit against a foreign commercial partnership, service of the writ of summons made upon a travelling salesman of the partnership, whose powers are limited to taking orders at prices furnished to him by his employers, is not sufficient to give jurisdiction to the Courts of the Province of Quebec.—2. A contract for the purchase of goods is complete at the place where the order is accepted by the vendor.—3. The presence in the Province of Quebec of a package of goods bought by the plaintiff from the defendant, and refused by him, which package the defendants' traveller is charged to take back if it is untouched and uninjured, and which he alleges is not so untouched, does not constitute property in the jurisdiction sufficient to give to the Courts of the Province of Quebec jurisdiction over the defendants. *Malouf v. Zech*, 5 Q. P. R. 153.**

**4. Foreign unincorporated voluntary association — Parties—Capacity — Proper time to raise question.] — The right to maintain an action or the liability to be sued can only be by or against persons as individuals, or as a corporation, or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents.—A local union of workmen, a purely voluntary association, occupying none of such capacities, are not liable to be sued; and a writ served upon them was therefore set aside.—*Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 429, distinguished.—Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside the service of the writ on a motion made therefor, than to allow the case to proceed to trial with a certainty of its ultimate dismissal. *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 23 Occ. N. 152, 5 O. L. R. 424.**

**5. Heirs of deceased — Infants—Curator—Renunciation—Vacant succession.] — The general provision of Art. 135, C. C. P., authorizing service upon the heirs of a person deceased within the previous six months, without mentioning their names or residences, by leaving the document for them at the former domicil of the deceased, does not apply to heirs who are not capable of pleading, e.g., minors, and who, moreover, at the time of the service were not actually interest-**



ed, their tutrix having renounced the succession of the deceased in their behalf.

—2. The fact that the curator to the vacant succession may have had knowledge of the service of the writ and made no objection, cannot be taken as equivalent to a service nor avail to support an *ex parte* judgment obtained without legal service. *Turcotte v. Dansereau*, 27 S. C. R. 533, followed. *Marion v. Brien dit Desrochers*, Q. R. 23 S. C. 45, 52.

**6. Irregularity — Re-service — Exception to form—Costs.**—A writ of summons and the declaration annexed thereto irregularly served upon the defendant, may be regularly served again upon him after the filing of an exception to the form complaining of the illegality of the first service, provided that the second service is made within six months of the date of the writ, and in that case the plaintiff will be ordered to pay the costs of an exception to the form. *Alexander v. Helfenberg*, 5 Q. P. R. 246.

**7. Return — Motion for leave to make return — Motion to dismiss—Costs —Leave to sue in formâ pauperis.**—A motion to authorize a plaintiff to return a writ after the time has expired will be granted with costs of motion against the plaintiff.—2. In such case, a motion for *congé-défaut*, made after a motion for leave to return after time expired, should be dismissed without costs.—3. Leave to sue in *formâ pauperis* will not be granted by the Superior Court when the action is more properly one for the Circuit Court (*e. g.*, alimony.) *Boiteau v. Boiteau*, 5 Q. P. R. 301.

**8. Return without bailiff's report of service—Irregularity—Amendment.**—An action will not be dismissed upon exception to the form because the report of service does not appear upon the writ, if this irregularity is afterwards remedied; no prejudice having been caused, the exception to the form will be dismissed with costs against the plaintiff. *Soucy v. Forget*, 5 Q. P. R. 154.

**9. Service out of jurisdiction — Notice—Company defendant.**—The defendant company were incorporated by Act of the Parliament of Canada, and had their head office at Winnipeg. The plaintiffs obtained *ex parte* an order giving them leave to issue a writ of summons against the defendant company and to serve a notice of the same upon the company in Winnipeg. The notice having been served, the defendant company moved to set aside the service as irregular:—*Held*, that Order XI., Rule 4, did not apply. The defendant company were not a foreign company, and therefore the

writ and not a notice thereof should have been served. The service of the notice was set aside with costs. *Manley v. Great West Life Assurance Co.*, 23 Occ. N. 206.

**10. Service out of jurisdiction—Parties—Injunction—Con. Rule 162.**—An order allowing service of a writ of summons out of the jurisdiction cannot be supported under clause (e) of Con. Rule 162, unless the injunction can properly be asked as against the defendant out of the jurisdiction sought to be served.—In proceeding under clause (g) of Con. Rule 162 the defendant within the jurisdiction should be served with the writ and then an order applied for for leave to serve the defendant resident out of the jurisdiction with a concurrent writ, and failure to proceed in this way is not such an irregularity merely as can be condoned. — *Collins v. North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228, followed.—*Livingstone v. Sibbald*, 15 P. R. 315, *Mackay v. Colonial Investment and Loan Co.*, 4 O. L. R. 571, 22 Occ. N. 389, and *In re Jones v. Bissonnette*, 3 O. L. R. 54, 22 Occ. N. 53, considered. *Postlethwaite v. McWhinney*, 23 Occ. N. 333, 6 O. L. R. 412.

**11. Service out of jurisdiction—Sale of goods—Breach of contract—Place of performance — Property passing—Order for service—Affidavit—Forum—Discretion.**—The defendants lived in England. One of them, being in Ontario, saw the plaintiffs, who lived in Ontario, and it was agreed that the plaintiffs should send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, via Leyland line from Boston, delivered f. o. b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the goods shipped in the same way. Before this order was filled the defendants were sued in England for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned:—*Held*, that the property in the goods passed to the purchasers on the delivery on board the vessel at Boston, and an action would thereupon lie in Ontario, which was the place for payment, for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in a case of a sale by sample, *primâ facie* the place of delivery is the place for inspection, and there was nothing in the contract to rebut the presumption; and therefore the

action came within Rule 162 (1) (e), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed.—2. That it was not necessary for the plaintiffs, in obtaining an *ex parte* order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods, and returned them to the plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained.—3. That a proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England. *Atkinson v. Plimpton*, 23 Occ. N. 331, 6 O. L. R. 566.

**12. Substituted service — Solicitor.**—After instructions to a solicitor to accept service of a writ of summons had been revoked, an order was obtained by the plaintiff for substituted service of the writ upon him:—*Held*, that he had no *locus standi* to move to set aside the order. *Young v. Dominion Construction Co.*, 19 P. R. 139, corrected. *Taylor v. Taylor*, 23 Occ. N. 335, 6 O. L. R. 356.

## II. OTHER CASES.

**1. Address of defendant—Foreign defendant.**—The address of the defendant is a necessary part of the writ of summons, and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was, on his application, set aside with costs. *State Savings Bank v. Columbus Iron Works*, 23 Occ. N. 306, 6 O. L. R. 358.

**2. Irregularities — Prejudice—Quia tam action — Reference to Sovereign — Name of plaintiff.**—In an action *quia tam*, the defendant cannot set up grounds resulting from irregularities of the plaintiff as long as they do not cause prejudice. — 2. The word “us” in the words “suing as well in his own name as for us” contained in form 3 of the Rules

of Practice of the Superior Court, is sufficient to designate his Majesty the King.—3. It is not necessary to give all the plaintiff's names, provided he is sufficiently designated in the writ. *Ridgeway v. Collier*, 5 Q. P. R. 308.

**3. Renewal — Grounds for — Sufficiency of—Statute of Limitations.**—An *ex parte* order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence having been made, it was shewn on a motion to set aside such order that the defendant had never changed his place of residence, and that it could readily be ascertained from the directory:—*Held*, that the order should not be set aside, the local Master who made the *ex parte* order having been satisfied as to the efforts made to effect such service, and nothing having been withheld from him; despite the fact that, but for the existence of the writ, the ordinary period of limitation would have expired. *Howland v. Dominion Bank*, 15 P. R. 56, and *Mair v. Cameron*, 18 P. R. 484, distinguished. *Canadian Bank of Commerce v. Tennant*, 23 Occ. N. 202, 5 O. L. R. 524.

**4. Saisie-revendication — Declaration — Filing — Time — Record.**—A writ of summons or of *saisie-revendication* filed without the original declaration is an absolutely void proceeding, and a defendant, who has appeared in the cause but who has not pleaded, make take advantage of the nullity at any stage of the cause without having recourse to an exception to the form, and have the action dismissed upon motion to that effect even on the day fixed for hearing; for in such case there is really no action before the Court.—2. A declaration placed upon the record outside of the time allowed to the plaintiff for a return of his action and a long time after the return of the writ, without the consent of the opposite party or the permission of a Judge, is irregularly upon the record and will be considered as if it were no declaration at all. *Bouchard v. Boivin*, 6 Q. P. R. 41.

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